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No. 82-____

IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,
Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

In keeping with the United States' commitment under the Treaty of Guadalupe Hidalgo that the property rights of former Mexican citizens "shall be inviolably respected," Congress passed the Act of March 3, 1851 "to ascertain and settle the private Land Claims in the State of California." The validity of an 1839 Mexican grant to petitioner's predecessors was confirmed under the 1851 Act, and a federal patent issued without qualification or reservation. The court below, however, held that upon its admission to the Union, California had obtained from the United States an expansive "public trust" property interest precluding virtually all uses by petitioner of the shallow wetlands involved. In these circumstances, the questions presented are:

1. Whether, when the federal government pursuant to its treaty obligation confirmed a Mexican land grant and patented the land to private parties without qualification, the United States silently reserved a "public trust" property interest, to which the State of California succeeded.

2. Whether the State of California may collaterally attack a factual determination in an 1851 Act patent proceeding that the Mexican grant land was not tidelands.[1]

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[1] In the California Supreme Court, this case was entitled *City of Los Angeles v. Venice Peninsula Properties.* The suit was instituted by the City of Los Angeles against Ethel Fraser Carmen-Ryles; Robert D. Byrne and Byrne C. Manson, as Trustees under the Will of Olive Byrne Jones, Deceased; Fraser's Million Dollar Pier Company; United California Bank, as Trustee under the Will of Herbert Richmond Gage; Ruth Jones Wright; Hughes Tool Company (now Summa Corporation); the State of California and one thousand Doe defendants. Southern California Gas Company was added as defendant Doe 1. Venice Peninsula Properties succeeded to the interests of Ethel Fraser Carmen-Ryles, Fraser's Million Dollar Pier Company and United California Bank and was substituted as the first-named defendant below. The State of California was named as a defendant because of a provision of California law that makes the State a necessary party to any action by or against a city involving "the title to or boundary of tidelands." Calif. Pub. Res. Code § 6308.

The City claimed to be the present owner of a "public trust" easement in petitioner's property. The State supported the City's claim, and filed a cross-complaint against the other defendants alleging that the State had owned a "public trust" interest in the property in question, which it had granted to the City. All of the defendants except Southern California Gas Company stipulated to be bound by the outcome of the litigation between the City of Los Angeles and the State of California and Summa Corporation. As a result, they did not actively participate in the proceedings below. Southern California Gas Company, the owner of a pipeline easement across petitioner's land, no longer has an interest in the outcome of this proceeding because of the concession by respondents that the company would have to be compensated for any damage to its facilities.

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STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Summa Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered in this proceeding.

OPINIONS BELOW

The findings of fact and conclusions of law of the state trial court, entered on February 22, 1977, and the judgment it entered on October 11, 1977, are unreported. The opinion of the state Court of Appeal (and dissent), reversing the trial court, is reported at 172 Cal. Rptr. 619 (1981). That opinion was superseded when the California Supreme Court granted a hearing, and was not published in the official report. *See* Calif. Rules of Court, Rule 976(d) (1972). The opinion of the state supreme court (and dissents), affirming the trial court, is reported at 31 Cal. 3d 288, 182 Cal. Rptr. 599, 644 P.2d 792 (1982). All of these opinions and orders are reproduced in the Appendix hereto.

JURISDICTION

The opinion of the California Supreme Court was entered on May 10, 1982. A timely petition for rehearing was filed, and was denied on June 16, 1982. On August 26, 1982, Mr. Justice Rehnquist extended petitioner's time to file a petition for a writ of certiorari until October 22, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

TREATY AND STATUTE INVOLVED

Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848).

Act of March 3, 1851 "to ascertain and settle the private Land Claims in the State of California," 9 Stat. 631 (1851).

The Treaty and Act are set forth in Appendix B-1 and Appendix B-2, respectively.

STATEMENT

This case presents fundamental issues concerning the respective property interests of the State of California and petitioner in shallow wetlands conveyed to petitioner's predecessors by Mexico prior to the cession of California to the United States. Title to this land was confirmed in and patented to the Mexican grantees by the United States pursuant to the Treaty of Guadalupe Hidalgo (9 Stat. 922 [1848]) and the Act of March 3, 1851 "to ascertain and settle the private Land Claims in the State of California." 9 Stat. 631 (1851). At issue is whether under the Equal Footing Doctrine, California on statehood obtained from the United States a "public trust" property interest in this land.

In the decision below, the California Supreme Court determined that despite Mexico's grant and the United States' unqualified confirmation of full title in petitioner's predecessors, both Mexico and the United States had silently reserved a "public trust" interest which passed to California on statehood. Under California law, the "public trust" interest decreed is so extensive as virtually to usurp petitioner's underlying title. For example, the "public trust" interest supports a requirement that even dry land be perpetually preserved as open space. *See Marks*

v. Whitney, 6 Cal. 3d 251, 259-261, 98 Cal. Rptr. 790, 796-797, 491 P.2d 374, 380-381 (1971). (*See also* p. 6, *infra*.)

Confirmed Mexican grants form the basis of title to much of the land in California. Following the line of the Spanish missions stretching from San Diego to Sonoma, most of the land along the Pacific coast is located within former Mexican ranchos or pueblos. While the Mexican grants of these properties regularly excluded the ocean beaches, they often included minor sloughs, lagoons, and shallow pools lying inland from the ocean shore. These lands, many of which have been filled and subdivided, constitute some of the most valuable real estate in California.

The present decision clouds the title to these extensive properties. In reaching its result, the California Supreme Court failed to follow repeated decisions of this Court which hold that California, upon admission to the Union, obtained no property interest under the Equal Footing Doctrine in lands within Mexican grants confirmed pursuant to the Treaty of Guadalupe Hidalgo. That fundamental error, together with its importance to the property holdings potentially involved, merit the attention of this Court.

A. The Property In Dispute And The Origin Of Petitioner's Title.

The land in issue is part of a very shallow and narrow body of water, known as Ballona Lagoon, which lies generally parallel to and approximately 300 yards inland from the shore of the Pacific Ocean. (Exh. 74.)[2] As a result of earlier condemnations, Ballona Lagoon is bisected both by a flood control channel and by a dredged entry channel connecting the nearby Marina del Rey yacht harbor with the Pacific Ocean. (Exhs. E & G; R.T. 850-877.) These projects have left a very small pond or lagoon remnant on one side and a somewhat larger one on the other.

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[2] "C.T." refers to the Clerk's Transcript on appeal in the state court. "R.T." refers to the Reporter's Transcript of the trial proceedings. "Exh." refers to the exhibits introduced into evidence at trial. "App." refers to the Appendix hereto.

The latter, which constitutes the property in issue,[3] was placed in flowage communication with the Marina del Rey entry channel as a part of the construction of that project. The communication takes place by means of a pipe which connects to a motorized tide gate. (C.T. 564, 778, 796.) The lagoon remnant is approximately 1500 yards long, 25 yards wide, and at mean high tide the water is one to six feet deep.[4] (R.T. 628-630; Exhs. 66 & 74.) At low tide it is virtually dry. (R.T. 662.)

Petitioner's title is derived from an 1839 Mexican grant of "Rancho La Ballona." On Mexico's cession of California to the United States in 1848, the United States agreed in the Treaty of Guadalupe Hidalgo that the property rights of Mexicans in the newly-acquired territory "shall be inviolably respected." 9 Stat. 922, 929, Art. VIII (1848). In accordance with the treaty obligation, Congress in 1851 passed "An Act to ascertain and settle the private Land Claims in the State of California." 9 Stat. 631 (1851).

The Mexican grantees of Rancho La Ballona filed a petition for confirmation of their title under the 1851 Act. After hearing, the petition was granted by the Board of Land Commissioners in 1854 and affirmed by the United States District Court on appeal in 1855. (Exh. A, pp. 36-37, 49-53.) In accordance with the further procedures established by the 1851 Act, a survey of the confirmed claim was thereupon prepared, approved by the

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[3] Petitioner owns one of the two lots which together constitute this remnant. The owners of the second lot were also named as defendants below, but by stipulation agreed to be bound by the outcome of the litigation against petitioner. *See* note 1, *supra*. *See also* App. A-6, p. A-67.

[4] Although the trial court found that at high tide the waters within the lagoon are navigable by "rowboats, canoes, surfboards and other shallow-draft craft" (App. A-5, p. A-52), it was admitted at trial (C.T. 986) that the waters are not navigable in commerce, which is the federal test of navigability for Equal Footing purposes, *United States v. Oregon*, 295 U.S. 1, 14-15 (1935), and that they are not navigable in interstate commerce, which is the federal test of navigability for the Commerce Clause servitude. *Kaiser Aetna v. United States*, 444 U.S. 164, 178-179 (1979).

Surveyor General of California, and submitted to the General Land Office for the issuance of a patent. (*Id.*, pp. 62-66.)

The survey submitted established the shore of the Pacific Ocean as the southerly boundary of the Rancho.[5] (App. C-2.) The General Land Office, however, declined to approve the survey, noting that it contained an area just inland from the ocean which was labeled "inner bay." It remanded the survey to the United States Surveyor General with directions that, "unless good cause be shown to the contrary," the survey be amended to substitute the shore of the "inner bay" for the ocean boundary. (App. D-1.)

In the proceedings that followed, the Mexican grantees presented affidavits that the "inner bay" was not an "arm of the sea" but rather land intermittently overflowed with fresh water in times of storms when sand blocked an adjacent creek's outlet to the ocean. (Exh. A, pp. 438, 442, 446.) Based on this submission, as well as the survey field notes and the underlying Mexican *diseño* (map), the General Land Office ultimately determined that the "inner bay" was not an arm of the sea and withdrew its earlier objection to the survey's ocean boundary. (App. D-2, pp. A-136, A-138.) The survey was thereafter approved by the Secretary of the Interior and a patent issued confirming title to the "inner bay" in the Mexican grantees. (Exh. A, pp. 518-520; App. C-1.)

"Ballona Lagoon" in its present configuration was treated by the California courts as the remnant of the larger "inner bay" depicted on the United States patent survey. The courts further concluded that the lagoon is a tidal "arm of the Pacific Ocean" which has continually existed as such for more than 900 years. (App. A-5, p. A-52; App. A-1, p. A-7 & note 6.)

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[5] The compass direction of the Pacific shore at the point in question is actually southwest, but the General Land Office regularly referred to the ocean as lying to the south.

B. The "Public Trust" Doctrine In California Law.

On California's admission to the Union, the United States' title to all California tidelands not subject to prior Mexican grant passed to the State as "absolute property" under the Equal Footing Doctrine. *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65-66 (1873). *See also Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). However, California determined early on that her title to such property was held in trust for the people of the State for purposes of commerce, navigation and fishing. *See Eldridge v. Cowell*, 4 Cal. 80, 87-88 (1854).

During the early years of statehood, the California legislature enacted a number of statutes providing for extensive sale of publicly owned tidelands. In *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913), the California Supreme Court considered the effect of certain statutes which authorized tideland sales without regard to any trust purpose. *Id.* at 590, 138 P. at 85. Although asked to declare such sales void, the court held instead that they conveyed a fee which did not represent "the entire title." *Id.* at 589, 138 P. at 84. It determined that the State had impliedly reserved a "public trust" interest by which the State retained the right "to enter upon and possess" the land and to make "changes and improvements" for "the preservation and advancement of trust uses." *Id.* at 588-589, 138 P. at 84. The property interest so reserved has been said to persist despite the land's lawful reclamation,[6] and the "trust uses" for which the State may "possess" the land include "preservation" so that it may serve as "open space" and "favorably affect the scenery" of the area.[7] *Marks v. Whitney*, 6 Cal. 3d 251, 259-261, 98 Cal. Rptr. 790, 796-797, 491 P.2d 374, 380-381 (1971).

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[6] The "public trust" interest is distinct from the easement to traverse and fish navigable waters. The latter follows navigable water without regard to any property interest in the submerged land and automatically terminates on reclamation. *See Bohn v. Albertson*, 107 Cal. App. 2d 738, 757, 238 P.2d 128, 140 (1951).

[7] Approved "public trust" uses include the construction of a YMCA building, *People v. City of Long Beach*, 51 Cal. 2d 875, 338 P.2d 177

C. Proceedings Below, Parties, And Jurisdictional Matters.

This action was commenced in the Los Angeles County Superior Court on September 13, 1965 when the City of Los Angeles filed a Complaint for Declaratory Relief and to Quiet Title to two parcels of land which together constitute the larger remnant of "Ballona Lagoon." (C.T. 1-14.) Named as defendants were all of the individuals and entities which had an interest of record in either of the parcels.[8]

The City alleged that it was the owner of a "public trust" interest in the subject property. It claimed to be the grantee of the State of California,[9] which allegedly received the interest on statehood "by virtue of its sovereignty." (C.T. 4.) The State subsequently filed a cross-complaint supporting and reiterating the City's allegations. (C.T. 115-120.)

At the time of filing its Complaint, the City sought to establish its "public trust" interest in order to avoid paying just compensation for dredging the property as a part of the then-contemplated construction of a small craft waterway system in the adjacent Venice Canals.[10] (C.T. 5.) However, by the time of

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(1959), and drilling for oil. *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928). "In administering the trust the state is not burdened with an out-moded classification favoring one mode of utilization over another." *Marks v. Whitney*, 6 Cal. 3d 251, 260-261, 98 Cal. Rptr. 790, 796, 491 P.2d 374, 380 (1971).

[8] These parties are identified in note 1, *supra*.

[9] By Chapter 77, Statutes of California, 1917, all interest held by the State of California, by virtue of its sovereignty, in tidelands within the boundaries of the City of Venice, a predecessor of the City of Los Angeles, was granted to the City. The statute, however, contains the express proviso "that nothing contained herein shall in any way affect any property held or claimed under, through or from a Mexican grant or patent therefor . . . ." This proviso reflected the common understanding that areas within Mexican grants were excluded from property received by California upon its admission to the Union.

[10] The Venice Canals are an interconnected series of narrow, shallow waterways which were constructed over 80 years ago as part of the

trial almost 10 years later, that project had been abandoned. Accordingly, the purpose of the "public trust" decree sought by the City was to establish public access to the land and to require its preservation as open space. (C.T. 448, 796.)

Following a bench trial, the trial court filed findings of fact which found that the property had been a tidal "arm of the Pacific Ocean" at all relevant times, and that under Mexican law the original grantees had not obtained any property interest in the land. (App. A-5, pp. A-52, A-54.) Although the trial court found that title to the property had been confirmed in petitioner's predecessors under the Act of 1851 (*id.*, p. A-58), it entered judgment on October 11, 1977 decreeing the land subject to a "trust" easement held by the State of California "for the People of the State."[11] (App. A-6, p. A-68.)

On petitioner's appeal, the judgment was reversed by the California Court of Appeal on March 25, 1981. (App. A-4.) With one judge dissenting, the Court of Appeal found that the "public trust doctrine" was applicable only to those lands to which California had once held title. (*Id.*, p. A-40.) Relying on the decisions of this Court, it held that California had not, on statehood, succeeded to any property interest in lands subject to previous Mexican grants, and that the federal patent issued to petitioner's predecessors was conclusive of California's claim. (*Id.*, pp. A-42–A-44.)

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private subdivision of lands northwest of Ballona Lagoon. (Exh. N-7.) Many of the canals have been filled, and those that remain have deteriorated to the point where they represent a health and safety problem. (Exhs. N-2, N-3, N-14.)

[11] The trial court judgment also awarded the City several easements under various state law theories of express and implied dedication. (App. A-6, pp. A-68 - A-69.) The California Supreme Court did not reach that part of the judgment, finding the uses which such easements supported "included within the public trust." (App. A-1, p. A-16.) Since the California Supreme Court decided the case on federal grounds, this Court has jurisdiction without regard to any state grounds which were not reached. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938).

The California Supreme Court granted a hearing in the case on May 21, 1981. By a decision filed on May 10, 1982, it affirmed the trial court's "public trust" decree. (App. A-1.) It reached this result by holding that Mexico had impliedly reserved a "public trust" interest in the property (App. A-1, pp. A-8–A-9), that such interest had passed to the United States on Mexico's cession of California (*id.*, p. A-9), that the United States had silently reserved that interest from its 1851 Act patent (*id.*, p. A-15), and that on admission to the Union, California succeeded to the reserved interest as an incident of sovereignty. (*Id.*) Two justices filed separate dissents from the four-person majority opinion. (App. A-1, pp. A-16–A-30, A-30–A-32.) The court denied petitioner's request for rehearing on June 16, 1981. (App. A-2.)

D. Federal Questions Raised And Decided Below.

The decision of the California Supreme Court is based on the determination of a number of controlling questions of federal law. First, whether a property interest in the land passed from the United States to California under the Equal Footing Doctrine is a federal question. *United States v. Holt Bank*, 270 U.S. 49, 54-56 (1926). *See also Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935). The California Supreme Court expressly determined "that the federal government retained an interest in the tidelands in question when it issued the patent to defendants' predecessors, and that this interest was acquired by California upon its admission to statehood." (App. A-1, p. A-15.) The assertion that such a property interest did pass to the State is central to the respondents' claim and was raised in both the City's complaint (C.T. 4) and the State's cross-complaint. (C.T. 117.)

Second, both the trial court and the California Supreme Court rejected petitioner's contention that California's property interest claim is in contravention of the United States' patent issued to petitioner's predecessors in interest, and is foreclosed by the State's failure to present its claim in the course of the 1851 Act proceedings. (App. A-5, p. A-59; App. A-1, pp. A-11–A-15.) These asserted rights arise under federal law and their rejection involves the determination of a federal question. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977);

Knight v. United States Land Association, 142 U.S. 161, 183-184 (1891). Petitioner raised these claims of federal right in its pretrial memorandum of law (C.T. 57-76), and maintained its position throughout the appeal.

Third, petitioner asserted throughout the trial and appeal that the determination of the United States General Land Office as to the then non-tidal character of the subject land is conclusive. (C.T. 64-67, 612-618.) Whether a factual determination made by the Land Office in the course of a patent proceeding is open to collateral attack is a federal question. *De Cambra v. Rogers,* 189 U.S. 119, 122 (1903). Accordingly, the California Supreme Court's holding that the Land Office's determination was not conclusive (App. A-1, p. A-7) constitutes an interpretation of federal law.

REASONS FOR GRANTING THE WRIT

For the first time, the California Supreme Court has held that the State owns an expansive and permanent "public trust" property interest in wetlands contained in Mexican land grants. The California court reached this admittedly unprecedented result notwithstanding that, pursuant to the Act of 1851, the private ownership of the land was confirmed by a federal court decree and patented by the United States without qualification or reservation and that neither California nor the United States ever had title to the land. This holding is contrary to the commitment undertaken in the Treaty of Guadalupe Hidalgo that the property rights of former Mexican citizens "shall be inviolably respected." 9 Stat. 922, 929, Art. VIII (1848).

The State's asserted "public trust" interest extinguishes fundamental aspects of private ownership. It would permit the State to "enter upon and possess" petitioner's land, to construct improvements on it, to afford public access to the land, and even to "preserve" the land in its natural state as open space without payment of compensation.[12] *Marks v. Whitney,* 6 Cal. 3d 251, 259-

[12] The scope of the State's asserted "public trust" interest is illustrated by this very case. While the City of Los Angeles initially asserted a

261, 98 Cal. Rptr. 790, 796-797, 491 P.2d 374, 380-381 (1971). (*See also* p. 6, *supra.*) In exercising its "public trust" rights, the State, not the private owner, is entitled to possession; the State, not the private owner, is entitled to develop (or not develop) the land; and the State, not the private owner, is entitled to control access. In fact, the interest left to the private owner has been characterized by the California Supreme Court itself as nothing but "the naked title to the soil." *People v. California Fish Co.,* 166 Cal. 576, 598, 138 P. 79, 88 (1913).

The state supreme court's holding that a "public trust" easement was silently reserved has far-reaching implications for the extensive Mexican grant lands along the coast of California. According to a recent study by the State Lands Commission, 512 of the 670 miles of California's coastline from Sonoma south have as their source rancho or pueblo grants confirmed by patents issued by the United States under the Act of 1851. The federal government owns over 90 miles of this coastline, which it acquired from private parties whose source of title was a Mexican land grant. California State Lands Commission, *Inventory of Ungranted Tidelands: Survey Priority Study, passim* and Appendix C (1981).

While this case does not affect California's coastal beaches, which were regularly excluded from Mexican land grants, it does affect the hundreds of sloughs, creeks and shallow pools lying inland from the shoreline, often separated from the ocean by a barrier beach, sand spit or other land mass. These wetland areas are a common feature of the California coastline, and were frequently included within Mexican grants. Under California law, such lands would be potentially affected whether they remain wetlands or have been filled and reclaimed. *See Atwood v. Hammond,* 4 Cal. 2d 31, 40-41, 48 P.2d 20, 24-25 (1935).

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right to dredge the shallow lagoon, the dredging project was abandoned by the time of trial, and the City now seeks to preserve the property as "open space." (C.T. 448, 796.)

Thus, if the California decision stands, large tracts of land confirmed and patented by the United States without qualification may now be burdened with a "public trust" easement that transfers the essential attributes of ownership to the State and precludes virtually all use of the lands by their owners.

I. THE FEDERAL CONFIRMATION AND PATENTING PROCESS PRECLUDE CALIFORNIA'S ASSERTED "PUBLIC TRUST" PROPERTY INTEREST.

In the Treaty of Guadalupe Hidalgo (9 Stat. 922 [1848]) the United States undertook a special obligation to honor and protect the property rights of Mexicans in the acquired territory. As a result, this Court has consistently held that tidelands contained within prior Mexican grants did not pass to California on its admission to the Union. *United States v. Coronado Beach Co.*, 255 U.S. 472, 487-488 (1921); *Knight v. United States Land Association*, 142 U.S. 161, 183-184 (1891). The Equal Footing Doctrine simply "does not apply to lands that had been previously granted to other parties by the former government." 142 U.S. at 183. *See also San Francisco v. LeRoy*, 138 U.S. 656, 670-671 (1891).

The mechanism that the United States established to carry out its treaty obligation that Mexican property rights "shall be inviolably respected" was the Act of March 3, 1851. 9 Stat. 631 (1851). Its purpose was to provide a procedure to determine Mexican land claims, and to confirm those found valid by issuance of a "conclusive" federal patent to serve as an "instrument of quiet and security to its possessor." *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491-493 (1866).

In carrying out its statutory duty, the Board of Land Commissioners was to be governed by "the laws, usages, and customs of the government from which the claim is derived . . . so far as they are applicable." 9 Stat. 631, 633, § 11 (1851). Thus, the question of the validity of a tidelands grant under Mexican

law was for the Commissioners to decide, and "it was a jurisdiction to decide rightly or wrongly."[13] *Thompson v. Los Angeles Farming Co.*, 180 U.S. 72, 77 (1901). *See also United States v. Coronado Beach Co.*, 255 U.S. 472, 488 (1921). Once made, that decision is conclusive and not subject to collateral attack. *Id.*

Recognizing that under this Court's controlling decisions the title of petitioner's predecessors could not be dislodged, the California court simply carved out a concurrent property interest for the State which it denominated a "public trust" easement rather than a fee. By such semantic sleight of hand, it effectively concluded that the United States patent had provided petitioner's predecessors with only "naked title to the soil,"[14] while silently reserving to California the right to "possess"[15] the land to the same extent that it possesses the tidelands which it received as "absolute property" under the Equal Footing Doctrine.[16] Thus, it is the State, and not the patent grantee, which enjoys each of the common incidents of ownership—possession, use, and control of access.[17]

But, however such "public trust" property interest is denominated, California's failure to present its claim during the

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[13] The California Supreme Court believed that tidelands were inalienable under Mexican law (*Las Siete Partidas*) and therefore assumed that if alienated, the tidelands must be subject to some sort of retained "public trust" interest. (App. A-1, p. A-9 & note 9.) However, the determination that Mexican law permitted alienation of tidelands without any retained interest in the government was one properly for the Land Office to make, and it was made consistently with the view of *Las Siete Partidas* taken by this Court in *Jover v. Insular Government*, 221 U.S. 623, 633 (1911).

[14] *See People v. California Fish Co.*, 166 Cal. 576, 598, 138 P. 79, 88 (1913).

[15] *Marks v. Whitney*, 6 Cal. 3d 251, 261, 98 Cal. Rptr. 790, 797, 491 P.2d 374, 381 (1971).

[16] *See Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65-66 (1873).

[17] Calif. Civil Code § 654 defines "ownership" of property as the right "to possess and use it to the exclusion of others."

1851 Act patent proceeding bars its belated assertion now. The 1851 Act required that "Each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same" to the Board of Land Commissioners within two years. 9 Stat. 631, 632-633, § 8 (1851). The Act did "not create a voluntary jurisdiction, that the claimant [might] seek or decline," and it "comprehended every species of title or right, whether inchoate or complete."[18] *United States v. Fossatt*, 62 U.S. (21 How.) 445, 448 (1859). And this requirement applies to state Equal Footing claims in derogation of Mexican grants just as it does to competing private claims. *Knight v. United States Land Association*, 142 U.S. 161, 184 (1891).

This Court has squarely held that failure to present a claimed interest in the patent proceedings constitutes an abandonment of the interest. *Barker v. Harvey*, 181 U.S. 481 (1901); *United States v. Title Insurance Co.*, 265 U.S. 472 (1924). *Barker* determined that the Indians' right of occupancy in Mexican grant lands was abandoned by failure to present their claim in the patent proceeding:

> "Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the

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[18] The California Supreme Court expressly recognized that the State's "public trust" easement is an interest in petitioner's property. (App. A-1, pp. A-8, A-11, A-15.) It did not find that petitioner holds its fee in trust, but rather that the bundle of rights in the property is shared between petitioner and California. Thus, the language in *Townsend v. Greely*, 72 U.S. (5 Wall.) 326, 335 (1866), that "If the claim was held subject to any trust, before presentation to the Board, the trust was not discharged by the confirmation and the subsequent patent," has no application here, because there is no contention that petitioner holds its fee in trust. The fact that California was found to hold *its* interest in trust is irrelevant. The issue here is the state of the title confirmed by the United States—was it a full title in petitioner's predecessors or a title divided between them and California? Determining such competing claims was the precise purpose of the 1851 Act proceedings.

naked fee to him burdened by an Indian right of permanent occupancy." 181 U.S. at 491-492.

In *United States v. Title Insurance Co.*, 265 U.S. 472 (1924), this Court declined the government's invitation to overrule *Barker*, reaffirming that "the purpose of the Act of 1851 was to give repose to titles as well as to fulfill treaty obligations, and that it not only permitted but required all claims to be presented to the commission, and barred all from future assertion which were not presented within the two years." *Id.* at 483.

California's present claim of a right to "enter upon and possess" petitioner's land is at least as broad as the Indian claims of occupancy found barred in *Barker* and *Title Insurance*.[19] The California Supreme Court's failure to find these cases "convincing authority" (App. A-1, p. A-15) constitutes a disregard of the controlling precedents of this Court, and a failure to accord full respect to the treaty obligations of the United States.

II. THE FEDERAL PATENT DETERMINATION THAT THE LAND WAS NOT TIDELANDS IS CONCLUSIVE AND NOT SUBJECT TO COLLATERAL ATTACK.

Petitioner's land cannot be subject to a tidelands "public trust" property interest because, as part of the 1851 Act patent process, the General Land Office of the United States Department of Interior made a specific determination that the land was not tidelands.

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[19] The state court's reliance upon the Mexican grant's reservation of "the traversing roads and servitudes" (servidumbres) (App. A-1, p. A-9) is just as misplaced as was the Indians' reliance on virtually identical language. The reservation "does not mean that the general occupation and control of the property is limited by any so-called servidumbres, but only that such full control shall not be taken as allowing any interference with established roads or cross roads, or things of like nature." *Barker v. Harvey*, 181 U.S. 481, 499 (1901).

After the Mexican grantees' title to Rancho La Ballona had been confirmed by the federal district court, Henry Hancock, Deputy Surveyor of the United States, surveyed the grant in July 1858. (App. C-2.) The Hancock survey, which showed the shore of the Pacific Ocean as a Rancho boundary, was approved by the United States Surveyor General in San Francisco on September 18, 1858, and forwarded to the General Land Office in Washington, D.C. (Exh. A, pp. 62-66.) On March 17, 1860 the General Land Office declined to approve the Hancock survey, noting that it contained an area just inland from the ocean which was labeled "inner bay." It remanded the survey to the Surveyor General for reexamination with directions that, "unless good cause be shown to the contrary," the survey be amended to show the shore of the "inner bay," rather than the shore of the open ocean, as the Rancho boundary. (App. D-1.)

In the proceedings that followed remand, the grantees of Rancho La Ballona presented affidavits testifying to the character of the "inner bay." (Exh. A, pp. 438, 442, 446.) On the basis of this and further evidence, the General Land Office withdrew its earlier objection and approved the Hancock survey on April 30, 1873. With respect to the character of the "inner bay," Commissioner Willis Drummond concluded as follows:

> "The character of this estero, or inner bay as it is marked on the plat of survey, is testified to by Tomas Talamantes, Jose del C. Sepulveda and Ignacio Machado, who in substance say it is not an arm of the sea, and that much of the tract represented as inner bay is suitable for pasturage. That this estero . . . *is not an arm of the sea is evident from the field notes and plat of survey which are not contradicted by any evidence in this case*, and which show that what this office in 1860, mistook for the mouth of an estero was meandered on its southeast side to within a few chains of the ocean, and on the east of said meandered line were found high hills, *that this inner bay is not an arm of the sea* and that the mouth of this estero is wholly outside the present survey of the Ballona rancho *is also shown by an official survey of the rancho Sansal Redondo which adjoins the southern portion of the eastern boundary of Hancock's survey of Ballona.*" (App. D-2, p. A-136.)

The Secretary of the Interior thereupon approved the Hancock survey (Exh. A, pp. 518-520), and a patent thereafter issued confirming title to the "inner bay" in petitioner's predecessors. (App. C-1.)

Under the Act of 1851, the General Land Office had unquestionable jurisdiction to determine the character of the "inner bay." *Compare Knight v. United States Land Association*, 142 U.S. 161, 182-184 (1891), *with Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 16-21 (1935). Defining the character of land for purposes of patent inclusion constitutes a determination of fact. *Burke v. Southern Pacific R. R. Co.*, 234 U.S. 669, 691-692 (1914). As early as 1898 this Court was able to say:

> "[I]f there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts." *Johnson v. Drew*, 171 U.S. 93, 99 (1898).

This rule of conclusiveness is fully applicable to findings made by the General Land Office in the course of an 1851 Act proceeding.[20] *See More v. Steinbach*, 127 U.S. 70, 83 (1888). The California court's reexamination of the 1850 character of the

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[20] Attempting to avoid the conclusiveness of the federal determination, the California Supreme Court conjured up what it called an "obvious ambiguity." (App. A-1, p. A-7.) To find the "ambiguity" the California court pointed to the survey's denomination of an "inner bay" which the court, by 1951 dictionary definition of "bay," thought indicative of an "inlet of the sea." (*Id.*) Since the Land Office's determination was inconsistent with this definition, the court said that there was an "ambiguity." But concern as to the character of the "inner bay" was what caused the Land Office initially to remand the survey for examination of that very question. Its subsequent determination that the uncontradicted evidence established that the "inner bay" was "not an arm of the sea" is anything but ambiguous.

land to retroactively decree a major property interest in derogation of the title confirmed by the General Land Office violates this fundamental principle.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

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82-708

No. 82-____

IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,
Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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APPENDIX A-1

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

[L.A. No. 31422. May 10, 1982.]

CITY OF LOS ANGELES,
Plaintiff, Cross-defendant and Respondent,

v.

VENICE PENINSULA PROPERTIES
et al., Defendants,
Cross-defendants and Appellants;
THE STATE OF CALIFORNIA
ex rel.
STATE LANDS COMMISSION,
Defendant, Cross-complainant and Respondent.

OPINION

MOSK, J.— In a series of recent cases, this court has considered the scope and effect of the public trust doctrine. Under that doctrine, the state holds a trust interest on behalf of the public in tidelands (*City of Berkeley* v. *Superior Court* (1980) 26 Cal.3d 515 [162 Cal.Rptr. 327, 606 P.2d 362]) and in lands between high and low water in nontidal navigable lakes (*State of California* v. *Superior Court* (*Lyon*) (1981) 29 Cal.3d 210 [172 Cal.Rptr. 696, 625 P.2d 239]; *State of California* v. *Superior Court* (*Fogerty*) (1981) 29 Cal.3d 240 [172 Cal.Rptr. 713, 625 P.2d 256]). The public may use such properties for purposes such as commerce, navigation, and fishing, as well as for environmental and recreational purposes. These lands may be conveyed to private persons only to promote trust uses, and grants not made for that purpose remain subject to the rights of the public. (For a scholarly analysis of the development of the public trust in the United States and in California, see Stevens, *The Public Trust* (1980) 14 U.C. Davis L.Rev. 195, 199 et seq.)

The foregoing cases involved property which was originally owned in fee by the state or federal government and granted by them to private persons. In the present case, the issue is whether the public trust doctrine applies to tidelands in which the state and federal government never had fee title. The tidelands involved here were originally acquired by private persons from the Mexican government prior to the time California was ceded to the United States under the Treaty of Guadalupe Hidalgo, and later patented to the owners by the federal government in accordance with the requirements of the treaty.

Ballona Lagoon, the subject of this proceeding, is an arm of the Pacific Ocean in the Marina del Rey area of Los Angeles. It is subject to the tides, and inundated with seawater at mean low tide and mean high tide. At mean high tide, the depth of the water is sufficient to be navigable by shallow draft vehicles. At its northern end, the lagoon is connected to the Venice Canals, and provides the sole source of water for them.

In 1905, the shore surrounding the lagoon was subdivided into three large abutting tracts, and some of the tidelands were filled and improved. The present case involves two of those tracts, lot R of the Silver Strand subdivision and a portion of lot C of the Del Rey subdivision, both of which consist entirely of waterways. Access to the lagoon is now provided by walkways surrounding the shore, public streets to the shoreline, and bridges across the lagoon. In recent years, motor-controlled tide gates were installed between the Pacific Ocean and the entrance to the lagoon to control the ebb and flow of the tide within the lagoon; they are used to prevent flooding of the adjacent land.

The City of Los Angeles desired to dredge the lagoon, construct sea walls, and make other improvements therein without exercising its power of eminent domain. It filed an action for declaratory relief and to quiet title in the lagoon against the owners of lots C and R, and the holder of an easement in these

lots (hereinafter called defendants).[1] The complaint alleged that the public owns an easement in the lagoon for commerce, navigation and fishing, for the passage of fresh water to the Venice Canals, and for water recreation. It alleged also that the lots had been dedicated by their owners for public use. The city joined the State of California as a defendant in the action, as contemplated by section 6308 of the Public Resources Code.[2] The state thereafter filed a cross-complaint, alleging that it had acquired an interest in the tidelands of the lagoon for commerce, navigaton and fishing upon admission to the Union, that it held this interest in trust on behalf of the public, and had granted its interest to the city. (For literary convenience, the city and the state will be referred to collectively as plaintiffs.)

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[1] Some of the defendants originally named in the action sold their interests in the lots to the present owners. Summa Corporation is the owner of the portion of lot C involved in this case; Venice Peninsula Properties and other defendants own lot R.

Southern California Gas Company, sued as a fictitious defendant, owns an easement for a pipeline which traverses the lagoon, and maintains an underground storage area on lot C which may extend beneath the waters of the lagoon. Its interest in this proceeding appears somewhat attenuated. The company sought a declaration that plaintiffs would be required to pay it compensation if relocation of the pipeline is required by the improvements which the city proposed to construct. However, there is no indication that these improvements will affect the company's easements; plaintiffs' briefs imply to the contrary. In any event, plaintiffs concede, as they must, that they will be required to compensate the company in the event any improvements they may make at some future time damage the company's facilities. (Pub. Resources Code, § 6312.)

Although the trial court found that the public's right is "paramount" to the rights of the gas company, we do not understand this finding to mean that, contrary to section 6312, the improvements constructed by the gas company may be taken without payment of compensation.

[2] Section 6308 provides: "Whenever an action or proceeding is commenced by or against a county, city, or other political subdivision or agency of the State involving the title to or the boundaries of tidelands or submerged lands that have been or may hereafter be granted to it in trust by the Legislature, the State of California shall be joined as a necessary party defendant in such action or proceeding...."

After a trial at which both documentary and testimonial evidence was received, the trial court determined that the state holds in trust for the people the easements claimed in the city's complaint, and that the state or its successors have the right to construct the improvements in the lagoon without exercising the power of eminent domain.[3] The court found also that defendants had dedicated the property as public streets or waterways.

Before discussing the primary issue of whether the tidelands trust applies to lands granted by Mexico and later patented to the owners by the federal government, we must consider defendants' claim that the trust doctrine does not apply to their property. They assert that the United States government determined as a fact in the course of the proceedings which culminated in the issuance of a patent to their predecessors in interest that the property in question was not tidelands, and this determination, right or wrong, cannot now be challenged by plaintiffs.

In order to decide this issue, we must examine the circumstances of the original grant and the subsequent patenting process.

In 1839, while California was a part of Mexico, the Constitutional Governor of California granted to Augustin and Ignacio Machado and Filipe and Tomas Talamantes a property known

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[3] In 1917, the state granted to the City of Venice any right which it had in tidelands within the boundaries of the city, in trust. The granting statute stated, "nothing contained herein shall in any way affect any property held or claimed under, through or from a Mexican grant or patent therefor within the present boundaries and jurisdiction of said city...." (Stats. 1917, ch. 77, p. 89.) The City of Los Angeles succeeded to the rights of Venice in these tidelands under a grant which excepted "any property held under, through or from a Mexican grant or patent...." (Stats. 1945, ch. 1513, p. 2826.) There is no indication as to why these exceptions were made. The critical question in this proceeding is whether the public has retained an interest in the property in question. Whether that interest is held by the city, or by the state (as the trial court concluded), has no significant effect on the public's rights in the property if such rights exist.

as Rancho Ballona. The rancho's western border was the Pacific Ocean, and it included lots C and R. After the war with Mexico was concluded by the Treaty of Guadalupe Hidalgo, California was ceded to the United States. Under the terms of the treaty, the rights of Mexican citizens to their property were to be "inviolably respected." (Treaty of Guadalupe Hidalgo, Feb. 2, 1838 [sic], Art. VIII, 3 West's Cal. Const. (1954) 727, 732.)

In keeping with this obligation, in 1851 the federal governmental passed "An Act to ascertain and settle the private Land Claims in the State of California" (hereinafter referred to as the Act of 1851), the purpose being to establish a method by which the claims to land granted by Mexico could be confirmed and settled in the grantees by the federal government. (9 Stat. 631.)

The Machados and Talamantes, following the procedure set forth in the act, petitioned the Board of Land Commissioners in 1852 for a decree confirming their title to the rancho. After a hearing, the board confirmed the title, describing the boundaries of the rancho in the same terms as the original Mexican grant. That decision was affirmed by the United States District Court in 1855.

However, before a patent could issue, a survey of the property was required, approved by the Surveyor General of California. (9 Stat. 633, § 13.) In 1858, Henry Hancock conducted a survey and prepared a plat which showed a large body of water labelled "inner bay" extending from the southwest corner of the property parallel to the Pacific Ocean in a northwesterly direction. Hancock's field notes set forth his measurements as he walked along the shores of the bay, crossed an inlet, and came to the Pacific Ocean.

For reasons which are not entirely clear from the record, the correctness of the survey was not determined until 17 years later. In 1869, objections to the survey were filed by owners of the ranch which bordered Rancho Ballona on the north, an area some distance from that marked "inner bay" on the Hancock survey. Under a statute passed in 1864 to expedite the settlement of land titles in California (13 Stat. 332), the Hancock survey was forwarded to Washington to the General Land

Office Commissioner, who was required to approve it prior to the issuance of the patent, and to settle conflicting claims to the lands surveyed. Commissioner Willis Drummond decided that the survey was accurate with regard to the disputed northern boundary. He determined also that the "inner bay" shown on Hancock's map was not an arm of the sea, basing this determination in part on three affidavits which stated that the area labelled "inner bay" on the plat was dry land used for pasturage, except at times of overflow at high water and during storms, when sand blocked the mouth of a creek which, on Hancock's plat, emptied into the "inner bay." However, Drummond approved the Hancock survey.

Thereafter, a patent was issued. It not only incorporated the plat prepared by Hancock, but his field notes as well. The grant was for "the tract of land embraced and described in the.... Survey...." Defendants base their claim that the patent proceedings determined conclusively that the "inner bay" was not tidelands, upon the finding of Drummond.

The parties are in disagreement as to what was finally decided in the patent proceeding[4] and whether the determination as to the character of the "inner bay" was necessary to the approval of the survey.[5] For the purpose of analyzing the effect of the patent we assume, without deciding, that defendants

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[4] The owners of the ranch north of the Rancho Ballona appealed Drummond's decision to the Secretary of the Interior; in affirming, the secretary referred specifically only to the boundary line dispute. From this circumstance, plaintiffs urge that Drummond's decision is not binding because it was an intermediate decision affirmed by higher authority only to the extent that it decided the boundary dispute.

[5] Plaintiffs claim that the question whether the "inner bay" shown on Hancock's map was an arm of the sea was not necessary to Drummond's decision because only the placement of the northern boundary was challenged; even if all the boundaries of the ranch were in issue, they argue, the question whether the "inner bay" was land or water was irrelevant to those boundaries. Defendants contend, on the other hand, that the area described as the "inner bay" would have been excluded from the grant if it had consisted of tidelands.

prevail on these matters and that Drummond's determination that the "inner bay" was not an arm of the sea was a final decision on that question and a necessary predicate to the issuance of the patent.

But these assumptions do not end the matter. The four corners of the patent, when considered in light of Drummond's finding, present an obvious ambiguity. The plat attached to the patent shows an "inner bay," and Hancock's field notes, repeated therein, describe his measurements around this bay. The principal definition of a "bay" is "an inlet of the sea, usually smaller than a gulf, but of the same general character. . . ." (Webster's New Internat. Dict. (2d ed. 1951) p. 234). Drummond had the power to investigate the correctness of the survey or to order that a new one be made (13 Stat. 332, 333). Instead, he approved it without requiring any changes even though it was inconsistent with his determination regarding the character of the "inner bay."

In view of this inconsistency between the terms of the patent and the opinion of Drummond, the trial court was justified in admitting evidence as to whether the area in question was an arm of the sea and tidelands at the time California was admitted to the Union in 1850. The court found as a fact that for more than 900 years the lagoon has been an arm of the sea, subject to the tides. This conclusion is supported by overwhelming evidence, and defendants do not seriously challenge its validity.[6]

We come, then, to the primary issue before us, i.e., whether defendants' property is subject to the public trust. Under the Act of 1851, all land in California, including tidelands, which

[6] Experts in the field of geology and geomorphology testified that the Ballona Lagoon is the remnant of a larger, wider, and deeper tidal body of water which existed in 1839 and for more than 900 years prior thereto. Their conclusions were based in part on surveys of the area by the federal government in 1876, 1887, and 1896, which showed the lagoon as an arm of the sea in a configuration consistent with the map drawn by Hancock, and scientific tests of the subsurface of the lagoon.

had belonged to Mexico and was not patented to private parties, became the property of the United States. (9 Stat. 631, §13, p. 633.) The federal government held the interest in tidelands in trust for the future state, and when California was admitted to the Union, it succeeded to the rights of the United States as an incident of sovereignty. (*City of Berkeley* v. *Superior Court, supra,* 26 Cal.3d 515, 521.)

Defendants urge that the tidelands trust is an incident of title, that the federal government never acquired title to tidelands granted by Mexico to private parties and confirmed by patents issued by the United States, and that it follows, therefore, that the state, upon admission to the Union in 1850, could not succeed to an interest which the federal government never possessed.[7] Plaintiffs concede that defendants have title to the tidelands, but they assert that the federal government acquired an interest in trust in such lands on behalf of the public when California was ceded by Mexico, that this interest did not pass with the patent issued to defendants' predecessors, and that the state acquired it as an incident of sovereignty in 1850.

In analyzing these conflicting claims, we must decide, first, whether the title which defendants' predecessors received from Mexico was subject to the rights of the public in the tidelands encompassed in the grant and, second, if so, whether the United States acquired these rights upon annexation of California.

The law of Mexico at the time of cession declared that the public had a right to the use of the tidelands; this right was similar to the common law public trust.[8] In the grant of the

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[7] California did not acquire *title* as an incident of sovereignty to tidelands which were patented under the Act of 1851. (E.g., *United States* v. *Coronado Beach Co.* (1921) 255 U.S. 472, 488 [65 L.Ed. 736, 742, 41 S.Ct. 378]; *People* v. *San Francisco* (1888) 75 Cal. 388, 398 [17 P. 522].)

[8] Law III of Title XXVIII of Las Siete Partidas, the law in effect while California was a part of Mexico, provided, "The things which belong in common to the creatures of this world are the following, namely, the . . . sea and its shores, for every living creature can use each of these things according as it has need of them. For this reason every man can use the sea and its shore for fishing or for

Rancho Ballona to the Machados and Talamantes, it was provided that the grantees "may enclose it without prejudice to the traversing roads and servitudes." An expert on the law of Mexico who testified on behalf of defendants stated that the purpose of this language was to preserve "the rights of the public . . . in the conveyance of large tracts of land by the authorities." [9] Thus, when California was ceded by Mexico, the title of defendants' predecessors was subject to the interests of the public in the tidelands included in the grant.

Next, we consider whether the United States acquired that interest upon annexation of California. There is little authority regarding this issue. As we have seen under section 13 of the Act of 1851, lands which had belonged to Mexico and were not patented by the federal government to private parties became the property of the United States. This provision does not state whether less than fee interests retained by Mexico in land conveyed by that government, such as the public interest in tidelands, also passed to the new government.

So far as we have been able to determine, only one case has addressed that question. Under Mexican law, a grant of land by the government did not include mineral rights. In *Moore* v. *Smaw* (1861) 17 Cal. 199, the court was called upon to decide, inter alia, whether the United States became the owner of the mineral rights in California lands granted by Mexico to private

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navigation, and for doing everything there which he thinks may be to his advantage." Law VI provided, "Rivers, harbors, and public highways belong to all persons in common. . . ." (Las Siete Partidas, CCH (Spain) (1931) pp. 820-821). The Mexican law originated in 13th century Spain under Alfonso the Wise. (Stevens, *The Public Trust, supra,* 14 U.C. Davis L.Rev. at p. 197.)

[9] Indeed, according to the expert witness, Mexican law prohibited the alienation of tidelands. While we are not aware of any authority on the question whether a conveyance of tidelands by Mexico (perhaps erroneously) preserved the public's right in the land, the concept of retention by the public of rights in lands conveyed by the government to private parties was not alien to the law of Mexico, as we shall see. In the absence of any indication to the contrary, we assume that tidelands conveyed by Mexico remained subject to the public's interest.

parties. It held that under the provisions of the Act of 1851, the mineral rights retained by the Mexican government were "by the cession passed, with all other property of Mexico within the limits of California, to the United States." (17 Cal. at p. 217.)

The same reasoning should apply to tidelands. The interest of the Mexican government in these lands, like mineral rights, was "property of Mexico," at the time of cession and therefore became the property of the United States. In view of the public's strong interest in tidelands, the established doctrine that title in such lands in the hands of private persons is usually subject to the rights of the public, and the rule that statutes conveying tidelands should be interpreted if reasonably possible to avoid a destruction of the public use (*People* v. *California Fish Co.* (1913) 166 Cal. 576, 597 [138 P. 79]), we hold that under the Act of 1851, the federal government succeeded to Mexico's right in the tidelands granted to defendants' predecessors upon annexation of California.

We reject defendants' assertion that the tidelands trust is inevitably an incident of fee title by the government. It is true, as they claim, that prior cases have described the trust in the context of tidelands which the government owns or owned at one time.[10] However, these cases do not hold that title in the government is essential to the existence of the trust. So far as we are aware, this is the first case which has squarely presented that question.[11]

Thus far, we have decided that upon annexation of California, the federal government succeeded to the ownership

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[10] For example, in *People* v. *California Fish Co., supra*, 166 Cal. 576, 584, tidelands are referred to as belonging to the state in its sovereign character, and in *Illinois Central Railroad* v. *Illinois* (1892) 146 U.S. 387, 452 [36 L.Ed. 1018, 1042, 13 S.Ct. 110], the government's interest in tidelands is described as "a title held in trust for the people of the state. . . ."

[11] We disapprove dictum in *San Deigo County Archeological Society, Inc.* v. *Compadres* (1978) 81 Cal.App.3d 923, 927 [146 Cal.Rptr. 786], to the effect that the public trust doctrine applies only to property to which the state has at one time held title.

of the public's rights in the tidelands contained in ranchos which had been conveyed by Mexico. The next question is whether those rights were relinquished by issuance of the patents to the Mexican grantees. The major disagreement between the parties arises over the effect of the patent on the tidelands. Defendants insist that the failure of the United States to reserve the public's right when it issued the patent to their predecessors bars plaintiffs from now asserting such rights. Plaintiffs counter—and the trial court found—that, while the questions of title and boundaries were conclusively decided upon issuance of the patent, whether the title was subject to the rights of the public was not an issue in the patent proceedings.

Although early cases of the United States Supreme Court relied upon by defendants declared that the deed granted by the United States pursuant to the Act of 1851 was a "quitclaim, or rather . . . a conveyance of such interest as the United States possessed in the land," (*Beard* v. *Federy* (1866) 70 U.S. (3 Wall.) 478, 491 [18 L.Ed. 88, 92]; *Adam* v. *Norris* (1880) 103 U.S. 591, 593 [26 L.Ed. 583, 584]), this view was later rejected by the high court. In *Boquillas Cattle Co.* v. *Curtis* (1909) 213 U.S. 339, 344 [53 L.Ed. 822, 825, 29 S.Ct. 493], it was held that a patent from the federal government was a "confirmation in a strict sense" of the interest received from Mexico. In the course of its opinion, the court observed, "It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to enlarge the grant." (213 U.S. at p. 344 [53 L.Ed. at p. 825].)[12]

Moore v. *Smaw, supra,* 17 Cal. 199, decided many years before *Boquillas,* appears at first blush to support defendants' assertion that any rights acquired by the federal government upon cession in lands conveyed by Mexico to private parties were granted by the patent. However, when the reasons for the

[12] In *Boquillas,* the plaintiff, who had received a grant of land from the State of Sonora, claimed that a patent to the land issued under a law similar to the Act of 1851 carried with it a preference to take water as a riparian landowner.

holding of *Moore* are analyzed, its effect is to support the position of plaintiffs.

As we have seen, *Moore* held that under the Act of 1851, the United States acquired ownership of minerals in lands which had been conveyed by Mexico to private parties because under Mexican law that government retained the ownership of the minerals. The question facing the court in *Moore* was whether the patent of the federal government, which reserved no interest in the minerals, granted that interest to the landowners. The court concluded that the grant included the mineral rights. It reasoned that California did not succeed to the interest of Mexico upon statehood since ownership of mineral rights was not an incident of sovereignty. Therefore, the federal government held that interest in the same capacity as a private landowner and, since a grant of land by an individual without reservation of mineral rights passed ownership of such rights to the grantee, the same rule should apply to conveyances of the government. The court went on to state that patents of the United State since the Revolution had uniformly been regarded as transferring all the interest which the government could possess in the soil, even when the grant was a confirmation of one made by a prior government.

Thus, although *Moore* held that the federal patent enlarged the property rights of Mexican grantees, the reason for its conclusion was that mineral rights are not an incident of sovereignty and, therefore, a patent by the United States which failed to reserve that right conveyed fee title to the grantee. The clear implication of this holding is that if sovereign rights to property had been involved the court's conclusion would have been otherwise. Tidelands are not held by the government in its proprietary capacity; they are held in trust for the benefit of the public, may not be alienated at will, and unlike lands containing mines, when tidelands are conveyed into private hands they ordinarily remain subject to the public interest even though the grant is purportedly in fee. (See, e.g., *Carver* v. *San Pedro, L.A. & S.L.R. Co.* (S.D.Cal. 1906) 151 F. 334, 337; *People* v. *California Fish Co., supra,* 166 Cal. 576, 593.) In the absence of convincing authority to the contrary, therefore, we may not presume that

the patent issued to defendants' predecessors included the interest in the tidelands which the United States government had acquired from Mexico.

Defendants cite numerous cases which they claim stand for the proposition that the patents issued under the Act of 1851 passed all interest of the federal government to the grantee, and that the state did not acquire any interest in the tidelands included in Mexican grants as an incident of sovereignty upon admission to the Union. These authorities establish that a federal patent determined conclusively that the grantee had title to the land described therein, and that this interest prevailed over later claims of ownership by private parties or the government. (E.g., *Knight* v. *U.S. Land Association* (1891) 142 U.S. 161, 184 [35 L.Ed. 974, 982, 12 S.Ct. 258]; *San Francisco* v. *LeRoy* (1891) 138 U.S. 656, 670-671 [34 L.Ed. 1096, 1101, 11 S.Ct. 364]; *Beard* v. *Federy, supra,* 70 U.S. 478, 492 [18 L.Ed. 88, 92-93]; *People* v. *San Francisco, supra,* 75 Cal 388, 398; *Teschemacher* v. *Thompson* (1861) 18 Cal. 11, 26.) Moreover, the fact that the land described in the patent included tidelands did not diminish its conclusive effect. (*United States* v. *Coronado Beach Company* (1921) 255 U.S. 472, 487-488 [65 L.Ed. 736, 741-742, 41 S.Ct. 378].)

Defendants rely heavily on the case last cited. In the *Coronado Beach* case, the United States desired to construct military facilities on an island in San Diego Bay, which included tidelands. The owner derived title from a Mexican grant, and the patent issued pursuant to the Act of 1851 included the tidelands within the boundaries described therein. The high court held that the owner of the island had title to the tidelands and the federal government was required to pay compensation for their taking. In the course of its opinion, the court determined that the question whether there was a grant of the tidelands and boundaries of the grant had been decided in the confirmation proceedings, that California never had title to the tidelands by virtue of its sovereignty because they had been included in the Mexican grant and confirmed in the

patentees, and that the grantees' title could not be collaterally attacked by the federal government.[13]

This case, like the others relied upon by defendants, involves the question whether the title or boundaries of patented lands originating in Mexican grants may be collaterally attacked. In the present case plaintiffs concede that defendants have title to lots C and R; they claim, as did the state in our prior tidelands decisions, that the title of the landowners is subject to the rights of the public.

One case cited by defendants, in addition to *Moore*, considered the question whether a right in property other than title was included in a patent issued to a landowner who derived title from Mexico. In *United States* v. *Title Ins. Co.* (1924) 265 U.S. 472 [68 L.Ed. 1110, 44 S.Ct. 621], the court held that Indians who had the perpetual right to occupy certain lands under Mexican law, did not retain that right in lands patented to private parties under the Act of 1851 because of their failure to assert it in the patent proceeding.[14]

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[13] The United States argued that the tidelands belonged to California, which had aquired title to them upon its admission to the Union. Rejecting this argument, the court stated, "But the title of the State was subject to prior Mexican grants. The question whether there was such a prior grant and what were its boundaries were questions that had to be decided in the proceedings for confirmation and there was jurisdiction to decide them as well if the decision was wrong as if it was right. The title of California was in abeyance until those issues were determined as the decree related back to the date of the original grant. . . . [A]lthough . . . the grant could have been construed more narrowly, that was a matter to be passed upon and when the decree and the patent went in favor of the grantee it is too late to argue that they are not conclusive against the United States. . . .[H]owever arrived at it was adopted by the United States for its grant and it cannot now be collaterally impeached." (255 U.S. at pp. 487-488 [65 L.Ed. at pp. 741-742].)

[14] The court reasoned in part that "a claim of a right to permanent occupancy of land is one of far reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. . . . Surely a claimant would have little reason for presenting to the land commission his claim of land, and securing a confirmation of that claim, if the only result

We do not find this case to be convincing authority. The right to occupy land is a normal incident of title, and we have no quarrel with the proposition that private persons who failed to assert their right to occupancy in the patent proceedings may not thereafter claim that right. But the right to exclude the public from tidelands is not a normal incident of title. To the contrary, as we have seen, conveyance of such lands by the government does not ordinarily free them from the burden of the public trust even though no reservation is made in the deed for the preservation of the people's interest.

It follows from what we have said that the federal government retained an interest in the tidelands in question when it issued the patent to defendants' predecessors, and that this interest was acquired by California upon its admission to statehood.

Our conclusion is supported not only by authority, but by policy as well. According to amicus curiae, California Land Title Association, most of the land along the Pacific Coast from San Diego to Sonoma is situated in former Mexican ranchos. We do not know how much of the tidelands contained in these ranchos was conveyed by Mexico to private parties. If these areas of tidelands are free of the public interest, there is no right in the federal government, the state, or its successors, to improve or to use them for trust purposes without pursuing condemnation proceedings.

The result would be a California Mason-Dixon coastline dramatically divided between the north, in which the public trust doctrine is respected, and the south, where it is unrecognized. A dual system of rights would be created. Grantees whose title derives from Mexican grants would enjoy title free of the public trust, whereas those whose title did not originate with Mexico would hold their land subject to the trust. The Treaty of Guadalupe Hidalgo requires only that the rights of Mexican

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were to transfer the naked fee to him, burdened by an Indian right of permanent occupancy." (265 U.S. at p. 484 [65 L.Ed. at pp. 1113-1114].)

grantees in their property shall be equal to that of citizens of the United States. (Treaty of Guadalupe Hidalgo, Art. VIII, 3 West's Cal. Const. (1954) 727, 732.) In view of this language, there is no justification for holding that a deed from the United States to its own citizens conveys lesser rights than a deed issued to grantees from Mexico, or that the public trust exists in tidelands north of Sonoma but not south of that point as to tidelands included in former Mexican ranchos.

In view of our conclusion, we need not discuss the trial court's findings that the public holds an easement in the property of defendants for the passage of fresh water to the Venice Canals and for water recreation, and that defendants' predecessors had dedicated the property for use as public streets or waterways. All these uses are included within the public trust. (*Marks* v. *Whitney* (1971) 6 Cal.3d 251, 259-260 [98 Cal.Rptr. 790, 491 P.2d 374].)[15]

We have examined other contentions made by the parties and find them to be without merit.

The judgment is affirmed.

Bird, C. J., Newman, J., and Broussard, J., concurred.

RICHARDSON, J.—I respectfully dissent.

In my view, the majority seriously errs in at least two respects, either of which independently is wholly sufficient to invalidate its reasoning and result. First, it extends the so-called "public trust doctrine," contrary to its fundamental rationale, to nonnavigable, nontidal waters on private property in which neither the state nor the federal government ever has asserted any title or interest. Second, it disregards the well established conclusive effect of the federal patent upon the

[15] Our opinion is not to be understood as deciding matters which are raised by the parties but are not necessary to the determination of the issue before us. For example, although the state alleged in its cross-complaint that portions of the Ballona Lagoon which have been filled are still subject to the public trust, that issue is not involved in the present proceeding, since the property here consists entirely of tidelands.

subject property under the Act of 1851. I think the majority is wrong on both counts.

Along the way the majority cavalierly overturns a century-old judicial determination that the premises in question did *not* consist of tidal navigable waters. Disregarding the earlier federal court finding of fact the majority now, more than 100 years later, substitutes its own retroactive "finding" that the subject property was, indeed, then covered by tidal navigable waters. Resting upon its self-created factual premise, the majority attempts to justify *both* its disavowal of the federal patent of 1873 which had established the private ownership and nonnavigable character of the land in question *and* its use of the public trust doctrine, which heretofore had applied only to navigable waters previously owned by public entities. These conclusions, like their common premise, are flawed.

The subject real property consists of two parcels underlying what is popularly referred to as the Ballona Lagoon located in the Marina Del Rey area of Los Angeles. Historically, the lagoon was part of Rancho Ballona. Much of the area of the original lagoon is now dry land as a result of natural and developmental filling. In its present configuration the lagoon consists of a narrow elongated area covered by very shallow water described as "brackish," and separated from the ocean by a strand or sand barrier. There is a substantial question as to whether sea water presently flows through the lagoon in any significant amount. The majority concedes that the lagoon is seldom navigable, and then only by "shallow draft vehicles." (*Ante,* p. 292.)

I emphasize, however, that the current status of the lagoon has—or should have—little legal relevance to a proper resolution of the issues before us. In my view, our decision was foreordained over 100 years ago when it was *finally and judicially determined as a matter of fact* that Ballona Lagoon was not then an "arm of the sea" but rather belonged, along with the rest of Rancho Ballona of which it was a part, to its then Mexican grantees.

Historically, Rancho Ballona was a part of Mexico. In 1839 the Mexican Governor of California granted the rancho, including the lagoon, to Augustin and Ignacio Machado and Filipe and Tomas Talamantes. On July 7, 1846, following the Mexican War and upon completion of the military occupation of California, the then American military commander, Commodore Sloat, promised that Mexican land titles would be recognized by the United States. This policy was formalized in 1848, when California was ceded by Mexico to the United States, in the Treaty of Guadalupe Hidalgo. In that treaty the United States solemnly committed itself to respect the rights and property of Mexican citizens in newly ceded California. This covenant to protect previously established Mexican property rights affected all forms of ownership, and for over 100 years it has been judicially recognized both by the United States Supreme Court (*Knight* v. *U.S. Land Association* (1891) 142 U.S. 161, 184-185 [35 L.Ed. 974, 982, 12 S.Ct. 258]; *Beard* v. *Federy* (1865) 70 U.S. (3 Wall.) 478, 490 [18 L.Ed. 88, 92] and by us (*Teschemacher* v. *Thompson* (1861) 18 Cal. 11, 22). Indeed, the majority acknowledges that "under the terms of the treaty, the rights of Mexican citizens to their property was [*sic*] to be 'inviolably respected.' " (*Ante*, p. 294.)

Consistent with these treaty obligations, the United States Congress enacted the Act of 1851 (the Act) which established procedures to be administered by a Board of Land Commissioners to confirm these rights. Under the Act, persons asserting ownership of California land through Mexican grants were required to submit their claims to the board, which was given broad powers to adjudicate the claims pursuant to the treaty, the laws of Mexico and the decisions of the United States Supreme Court. Upon board approval of the claim, the property was surveyed by the United States Surveyor General and a patent thereupon issued using the survey description.

The Act further mandated that, once issued, the United States patent was to be binding and conclusive as to all persons save and except "third parties"—that is those who had an earlier title recognized under Mexican law. Because any such superior title had to exist prior to 1846 when the land was ceded

to the United States, and because the State of California did not itself then exist, it has been consistently held both by the United States Supreme Court and by us that the "third parties" excepted under the Act did not include the state. (*Knight* v. *U.S. Land Association, supra*, 142 U.S. at pp. 185-186 [35 L.Ed. at pp. 982-983]; *People* v. *San Francisco* (1888) 75 Cal. 388, 403 [17 P. 522].)

In comformity with the Act, the 1839 Mexican grant of Rancho Ballona to the Machados and the Talamantes was formally confirmed by the Board of Land Commissioners in 1854, and affirmed on appeal by the United States District Court in 1855. Thereafter, the subject property was in litigation before the General Land Office for 18 years, the principal issue being the precise westerly boundary of the rancho, and particularly whether the "inner bay" (Ballona Lagoon) was within the rancho or part of the Pacific Ocean. The General Land Office, the duty of which was to "settle conflicting claims to the land surveyed," concluded that the "inner bay" (Ballona Lagoon) was *not* an arm of the sea but rather was "dry land used for pasturage" except during storms and times of overflow. Based upon the foregoing, a *United States patent on Rancho Ballona was finally issued in 1873 to the predecessors in interest of the present property owners.* The description used in the patent included the lagoon. The majority opinion assumes "without deciding" that the above factual determination as to the character of the lagoon "was a final decision on that question and a necessary predicate to the issuance of the patent." (*Ante*, p. 295.)

From the foregoing chronology, I conclude that the Rancho Ballona has been owned privately since 1839. The Mexican grant to the Machados and Talamantes, confirmed by the Board of Land Commissioners in 1854, affirmed by the United States District Court in 1855, approved by the Surveyor General of the United States in 1858, and having fully ripened into a United States patent in 1873, vested full legal title in fee simple absolute in the present owners' predecessors. In my view, this title has been free and clear of any right, title or interest of the State of California or any of its political subdivisions from that day to this.

It is significant that the private ownership of the lagoon was uniformly accepted for almost 100 years. In 1965, however, the City of Los Angeles, subsequently joined by the State of California, filed the present litigation which seeks both declaratory relief and quiet title. Los Angeles attempts, for the first time, to establish a public trust easement for "commerce, navigation and fishing" over the lagoon on a theory that the lagoon is tideland and navigable ocean water. Alternatively, plaintiffs allege an express or implied public easement over the lagoon. While now conceding, frankly, that defendants presently hold the fee simple title to the lots in question, plaintiffs argue that these lots, along with the entire lagoon, are burdened by a public trust easement.

It is obvious that much more is involved in this litigation than the title to two lots. By imposing a public trust easement upon properties which are neither tidal, navigable, nor formerly under public dominion, the majority has removed all heretofore recognized reasonable limitations on the scope of the public trust doctrine. What is left? While the majority refrains from defining the extent of the easement beyond the land under the water of the lagoon, the implications of its decision equally threaten large areas held in private ownership elsewhere in the coastal areas of this state. The private title to such property, and the right to use it, suddenly are clouded by the creation of a state-administered easement even though the state heretofore has neither owned such property nor asserted any interest in it.

There is no precedent for such an extension of public ownership. The Legislature has never reached so far, nor have we. In *City of Berkeley* v. *Superior Court* (1980) 26 Cal.3d 515 [162 Cal.Rptr. 327, 606 P.2d 362], a bare majority of this court first expounded the notion that *tidelands in navigable waters which had been conveyed by the state* to private parties nonetheless were encumbered by a reserved public trust for commerce, navigation, fishing and other uses. (*Id.*, at pp. 523, 528.) In the following year in *State of California* v. *Superior Court* (*Lyon*) (1981) 29 Cal. 3d 210 [172 Cal.Rptr. 696, 625 P.2d 239], the same majority extended this new doctrine to lands between high and low

water in *nontidal navigable lakes which had been granted by the state* into private ownership.

It should be carefully noted that the rationale of the public trust doctrine is that *public* lands conveyed into private ownership remain subject to public use for certain limited purposes unless the intention to extinguish that public right is clearly expressed in the grant. The doctrine operates when the ownership of land and waters vested in California upon its admission to the Union (*Borax, Ltd.* v. *Los Angeles* (1935) 296 U.S. 10, 15 [80 L.Ed. 9, 14, 56 S.Ct. 23]) is thereafter conveyed into private hands, the doctrine reserving in the public grantor a public trust. In short, the principle limits *subsequently created* private property rights. (*People* v. *California Fish Co.* (1913) 166 Cal. 576, 583-585 [138 P. 79].)

It seems to me obvious that this reasoning has no application to lands like those before us which *never* were owned publicly. Indeed, the majority freely acknowledges that we have never before applied the public trust doctrine to such property. (*Ante*, p. 298.) Nonetheless, my colleagues assert, without analysis, that prior government ownership is not essential to the application of that doctrine, but that unadorned, unsupported, bore conclusory assertion is not presuasive. In my view the majority thus errs in applying the public trust doctrine to the property before us, title to which has been exclusively in private ownership since 1839.

The second major error of the majority lies in its failure to acknowledge the binding effect of the federal patent issued to the predecessors in title of the present owners. After the lapse of a century, it reopens a factual issue conclusively resolved long ago in the federal proceedings. Citing no authority and without other justification, it thus endorses a collateral attack in the trial court upon the general judgment pursuant to which the patent was issued. It approves the superior court's reweighing of the evidence presented to the land commissioner in the federal proceedings 100 years earlier. It also accepts the superior court's belated "finding," based upon claimed inconsistencies in that evidence, that Ballona Lagoon *was* an "arm of

the sea, subject to the tides." (*Ante*, p. 296.) Accordingly, the majority now concludes that the federal patent of 109 years ago was improperly issued.

Such a collateral attack upon the federal patent is highly improper. The purpose of the proceedings leading to the patent and the effect of its issuance was to *settle* permanently all claims which were, or which could have been, raised in those proceedings. Over 120 years ago in describing a patent we observed "Upon all matters of fact and law essential to authorize its issuance, it imports absolute verity. . . ." (*Leese v. Clark* (1861) 18 Cal. 535, 572.) Among the factual issues resolved in the 1873 patent proceedings were the boundaries and the character of the property which was granted by Mexico to its nationals, and particularly whether the lagoon was an "arm of the sea" or was included in the grant. The United States District Court decided it was the latter.

It is well established that the interpretation of a federal land conveyance is determined by federal law. (*Shively* v. *Bowlby* (1894) 152 U.S. 1, 9-10 [38 L.Ed. 331, 335, 14 S.Ct. 548].) This includes federal patents on real property, a portion of which is tidelands. (*Borax, Ltd.* v. *Los Angeles, supra*, 296 U.S. at p. 22 [80 L.Ed. at pp. 17-18].) As previously noted, the Ballona patent was issued by the United States government, pursuant to an act of Congress. This congressional action was ordained by the commitments made by our national government in a treaty between the United States and Mexico. It is *federal not state* law that governs the interpretations of the patent before us.

The Act of 1851, pursuant to which the federal patent issued, contemplated not only the definition but also the *settlement* of titles. (*Knight* v. *U. S. Land Association, supra*, 142 U.S. at p. 184 [35 L.Ed. at p. 982]; *Beard* v. *Federy, supra*, 70 U.S. at p. 489 [18 L.Ed. at pp. 91-92]; *United States* v. *Coronado Beach Co.* (1921) 255 U.S. 472, 487-488 [65 L.Ed. 736, 741-742, 41 S.Ct. 378].) This was equally so whether the subject property was upland or tideland. As Mr. Justice Field sagely observed in his concurring opinion in *Knight*: "Mexico owned the tidelands as well as the uplands, and it was, of course, in her power to make such disposition of

them in the establishment and organization of her pueblos [and ranchos] as she may have judged expedient. *And whether she did make such disposition by her laws was a matter exclusively for the United States to ascertain and determine.*" (142 U.S., at pp. 201-202 [35 L.Ed. at p. 988], italics added.)

The federal judgment which found that the lagoon was non-tidal cannot be ignored, now, 100 years later, by a state court determination that it was then "tidal." Nor should the majority attempt to vacate a solemn federal conveyance recorded also over 100 years ago, thereby brushing aside both the federal judgment and conveyance and creating a sort of floating "tidal title" in order to extend the "public trust" doctrine to the subject property.

My colleagues insist that "when California was ceded by Mexico, the title of defendants' predecessors was subject to the interests of the public in the tidelands included in the grant." (*Ante*, p. 297.) The majority cites no cases whatever, Mexican, Spanish or American, federal or state, which have so held. In granting this property to the Machados and the Talamantes in 1839 Mexico may have had the power to reserve whatever interest it chose. The point is that there is no evidence whatever that it did limit or condition its grant. Moreover, the record before us is equally devoid of support for the novel proposition that *all* Mexican grants to private parties 140 years ago were subject to such an uncodified, Mexican or Spanish, "common law public trust." By its "recognition" of a reserved Mexican public interest 140 years after the fact, the majority retroactively imposes upon 19th Century Mexican jurisprudence a remedy never asserted by Mexico.

Serious adverse practical consequences flow from the majority's reasoning. In creating an implied "reservation" by Mexico of public rights in lands which it had granted to its nationals prior to the cession of California to the United States, the majority circumvents the clear import of section 13 of the federal Act of 1851. Under that section the United States acquired as its property *only* "lands which had belonged to

Mexico and [which] were *not* patented by the federal government to private parties . . . . " (*Ante,* p. 296, italics added.) But the subject property here obviously *had* been patented to private parties. How, then, does the majority justify its assertion that "less than fee interests were retained by Mexico" and excepted from the Mexican grant of 1839 to the Machados and Talamantes, and somehow thereafter passed to the United States with the cession of California in 1846?

The majority seeks support for its theory of an implied reservation of public rights in patented lands by analogy to our decision in *Moore* v. *Smaw* (1861) 17 Cal. 199. Because we held in *Moore* that there were "mineral rights *retained* by the Mexican government" when it granted lands to its nationals subsequently passed to the United States on cession, it is urged that public rights in tidelands were similarly retained. (*Ante,* p. 296, italics added.) What my colleagues fail or refuse to note, however, is a very basic distinction between *Moore* and the present case. In *Moore* we stressed that at the time of the Mexican grant to the private *Moore* grantees "it was the established doctrine of the Mexican law that all mines of gold and silver in the country, though found in the lands of private individuals, were the property of the nation. No interest in the minerals passed by a grant from the Government of the land in which they were contained, without express words designating them . . . . The Mexican law on this subject was derived from the Spanish law . . . . Under Spain, the mines constituted the property of the crown, as part of the royal patrimony." (17 Cal. at pp. 212-213.) Not so in our case. At the time of the Mexican grant to defendants' predecessors in title, *no similar doctrine* traditionally established that such land grants were subject to a reservation of any "public trust rights."

In the absence of some legal authority or a factual determination of such reservation by Mexico, *Moore* provides absolutely no support for the majority's inventive concept that public trust rights were somehow silently "reserved" by Mexico when it conveyed the premises into private ownership in 1839; were then quietly passed to the United States upon cession; thereafter, without either notice or acknowledgement were handed to

California upon its admission to the Union; survived the subsequent issuance of a patent by the United States; lay dormant for over 100 years, and then, warmed by 143 summers, like a juridical century plant sprang suddenly into life and full bloom in 1982.

Of even more significance, however, in *Moore* we destroyed the conceptual underpinnings of the majority's thesis. In carefully explaning the function of a federal patent, we there held that the patent *extinguished every interest* of the United States—*including the mineral rights* which we there concluded *had* passed to the federal government under established Mexican law pertaining to such rights. (*Moore, supra,* 17 Cal. at pp. 223-226.) We insisted that "The object of the act [of 1851] is to 'ascertain and settle' private land claims in California. This object is declared in the first section. It is not merely to ascertain but *'to settle' the claims;* that is, to establish them—to perfect them by *placing them, so far as the Government is concerned, beyond controversy." (Id.,* at p. 223, italics added.)

Thus, with due deference to my colleagues, I suggest that even if there was substance to the majority's view that certain "public rights" were reserved by Mexico after its grant of 1839 to defendants' predecessors and that such rights somehow passed to the federal government, in *Moore* we flatly rejected the notion that any such rights could survive the patent process. Our language was unambiguous and explicit: "There is nothing in the act [of 1851] restricting the operation of the patents thus issued to the interests acquired by claimants from the former Government, or distinguishing the patents in any respect from the general class of conveyances made . . . by the United States. *To all claimants alike, whose claims have been finally confirmed, patents are to issue without words of reservation or limitation. . . ." (Id.,* at p. 224, italics added.) The title and interest which the patentee receives, we described as: *"all the interest of the United States, whatever it may have been,* in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, in everything which is embraced within the signification of the term land. . . ." (*Ibid.,* italics added.) Thus, all interests, including mineral rights of the United States, were

there held confirmed in the patentee upon issuance of the federal patent. It follows that if the federal patent absorbed and passed to the grantees even those rights which Mexico had historically reserved to itself, a fortiori, it would pass to the patentee any rights which Mexico neither expressly reserved nor historically, in its law, had asserted.

The fact, of course, that both our language and conclusions in *Moore* are venerable and that Californians have lived with them for over 100 years does not prove them wrong. Federal patents today remain the firm and stable bedrock of much of California's land titles. I conclude that the patentees to the property before us received *all* of the interests of the United States, including any inchoate public trust rights which knowingly or otherwise the United States may have received from Mexico upon the cession of California to the United States. Those interests vested in defendants' predecessors in title when their patent was properly confirmed in the federal patent proceedings.

The foregoing principles of land title law have been well established in California for a long, long time. Thus, 123 years ago, and 8 years after adoption of the Act and before the issuance of the present patent, we said *"The patent,* which is the final document issued by the government, *is conclusive evidence of the validity of the original grant,* and of its recognition and confirmation, and of the survey, and its conformity with the confirmation, *and of the relinquishment to the patentee of all the interest of the United States in the land. It cannot be attacked collaterally, even for fraud. . . ."* (*Moore* v. *Wilkinson* (1859) 13 Cal. 478, 487, italics added.) We have consistently, and from the beginning, given this same effect to a patent. (*Teschemacher* v. *Thompson, supra,* 18 Cal. 11, 26-28; *Morrill* v. *Chapman* (1868) 35 Cal. 85, 88; *Miller* v. *Dale* (1872) 44 Cal. 562, 578; *Chipley* v. *Farris* (1873) 45 Cal. 527, 538-539; *Cassidy* v. *Carr* (1874) 48 Cal. 339, 344; *People* v. *San Franciso, supra,* 75 Cal. 388, 397.)

The United States Supreme Court has been equally consistent. Over a century ago it characterized as follows the effect of a patent and the nature of the conveyance confirmed thereby:

"[T]he patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country.... When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. *As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie.*" (*Beard* v. *Federy, supra,* 70 U.S. at pp. 491-492 [18 L.Ed. at pp. 92-93], italics added; accord *Dominguez De Guyer* v. *Banning* (1897) 167 U.S. 723, 740-744 [42 L.Ed. 340, 345-347, affirming *De Guyer* v. *Banning* (1891) 91 Cal. 400, 402-404 [27 P. 761]; *Thompson* v. *Los Angeles Farming & M. Co.* (1901) 180 U.S. 72, 77-80 [45 L.Ed. 432, 434-436, 21 S.Ct. 289].)

In *United States* v. *Coronado Beach Co., supra,* 255 U.S. 472, the Supreme Court held that the owner of realty, including tidelands, which was acquired by a Mexican grant and subsequently confirmed in federal patent proceedings, could not be deprived of its property without just compensation. The high court specifically emphasized that California never acquired title to the tidelands by virtue of its sovereignty because the property had been included in the Mexican grant, and having been confirmed in the patent proceedings, such title could not be collaterally attacked. (*Id.,* at p. 488 [65 L.Ed. at p. 742].) The same analysis, applicable here, compels a similar legal conclusion.

I find singularly unpersuasive the majority's attempt to distinguish cases such as *United States* v. *Title Ins. Co.* (1924) 265 U.S. 472 [68 L.Ed. 1110, 44 S.Ct. 621], wherein the Supreme Court concluded that the perpetual right of Indians under

Mexican law to use and occupy certain lands was lost when those lands were granted to Mexican nationals whose title was subsequently confirmed in the patent process. Finding that the "right to occupy land is a normal incident of title," the majority correctly concludes that such right must be asserted in the patent process or is lost. (*Ante*, p. 302.) With respect to the public right to use tidelands, however, the majority concludes otherwise. Offering no rationale for any such distinction, the majority simply declares, *ipse dixit*, that such a public interest *need not* be asserted in order to survive the federal patent process *because* the "conveyance of such lands by the government does not ordinarily free them from the burden of the public trust. . . ." (*Ante*, p. 302.) Such reasoning is, of course, circular, is sustained by no authority, and cannot be reconciled with our own long established holding that "*all* the interest of the United States, *whatever* it may have been" passes to the patentee upon issuance of a patent under the Act of 1851. (*Moore* v. *Smaw*, *supra*, 17 Cal. at p. 224, italics added.)

From all of the foregoing, I conclude that the subject property was owned by the government of Mexico until 1839, at which time it passed into private ownership. The State of California at that time, of course, did not exist. Assuming, for discussion purposes, that any "public interest" in such property had been retained by Mexico, such interest thereafter inevitably passed to the United States upon cession by Mexico. Surely, the interest could not have been retained by Mexico after cession. Pursuant to appropriate congressional authorization, the federal government subsequently entertained claims, public and private, to lands within California which formerly were conveyed by the Mexican government into private ownership. The property in question was subjected to these appropriate proceedings. As noted, the claims of defendants' predecessors in title were considered and affirmed in a valid judgment of the United States District Court which applied the binding federal law, the property was surveyed, the boundaries litigated, and finally in 1873 a United States patent was properly issued to defendants' predecessors. Both the United States and the State of California had ample opportunity in those proceedings to

assert any "public trust" interests that they might claim. They did not do so. To me, the record eloquently reflects that for over a century none of the parties harbored the notion that the rancho lands in question contained any lingering "trust" encumbrance. No case, federal or state, American or Mexican, has ever so held before today.

The detailed procedure established by Congress in its Act of 1851 was a forthright, direct and common sense method for resolving title. It is relevant to note that the title confirmatory proceedings were designed to resolve not some but *all* conflicting and disputed interests.

In the words of the high court: "[T]he purpose of the Act of 1851 was to give repose to titles as well as to fulfill treaty obligations, and . . . it not only permitted but required all claims to be presented to the commission, and barred all from future assertion which were not presented within the two years." (*United States* v. *Title Ins. Co., supra,* 265 U.S. at p. 483 [68 L.Ed. at p. 1113].) All claims not so presented were "regarded as abandoned." (*Ibid.*). The high tribunal in that case expressed an interpretive principle which has equal application here: " 'Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.' " (*Id.,* at pp. 486-487 [68 L.Ed. at p. 1114].)

The majority, however, purports to discover and by a judicial nudge to waken from its 109-year slumber a dormant public interest of the State of California in the lands in question. It does so at the expense of the constitutionally protected property rights of defendants.

I confess to a growing unease about what I view as an accelerating erosion of private property rights of California citizens. We need look no further than the first section of the very first article of the state Constitution to learn that the sovereign people of California have proclaimed: "All people are by nature free and independent and have *inalienable rights.* Among these are enjoying and defending life and liberty, *acquiring, possessing, and protecting property,* and pursuing and obtaining safety, happiness, and privacy." (Italics added.) From this solemn pronouncement of the people, identifying the protection of their property with the defense of their lives and liberty and describing such interests as "inalienable," I conclude that preserving the sanctity of a citizen's private property is a singular responsibility of government and its courts. When, therefore, that government itself seeks to trench on such constitutionally protected and "inalienable rights" of its own people, its conduct must be closely scrutinized and its reach carefully measured by the rule of law.

If the State of California or the City of Los Angeles seeks to "dredge the lagoon, construct sea walls" and otherwise now assert public dominion over the subject property and if either can demonstrate some valid public use, let it frankly, fairly and openly exercise its eminent domain power. Pursuant to the Fifth Amendment to the federal Constitution and article I, section 19 of the California Constitution, let state and city pursue established legal procedures to condemn the property in question, rather than upset long established principles in order to obtain the property "on the cheap," as it were. In compliance with the constitutional restrictions which are binding upon them, if the state and city now seek the use of the subject property, they should pay for it.

I would reverse the judgment.

KAUS, J.—I respectfully dissent.

As I read the applicable federal decisions, the dispositive issue in this case—namely, whether defendants' title to property deriving from a federal patent is subject to an overriding state "tidelands trust"—is a matter of federal, not state,

law. (See, e.g., *State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 375 [50 L.Ed.2d 550, 561, 97 S.Ct. 582]; *Knight v. U.S. Land Association* (1891) 142 U.S. 161 [35 L.Ed. 974, 12 S.Ct. 258].) In discussing California's interest in tidelands, *every* United States Supreme Court decision to which our attention has been directed draws a clear distinction between tidelands that passed to the state as sovereign, and tidelands—like those involved in the present case—that had been ceded by Mexico to private parties and whose title was later confirmed by a federal patent pursuant to the elaborate procedures adopted by the federal government to comply with the Treaty of Guadalupe Hidalgo. These decisions uniformly hold that whereas California obtained a sovereign interest in the former category of tidelands under the general common law public trust doctrine, "[t]here is the established qualification that this principle is not applicable to lands which had previously been granted by Mexico to other parties...." (*Borax, Ltd.* v. *Los Angeles* (1935) 296 U.S. 10, 15-16 [80 L.Ed. 9, 14, 56 S.Ct. 23]; *United States* v. *Coronado Beach Co.* (1921) 255 U.S. 472, 487-488 [65 L.Ed. 736, 741-742, 41 S.Ct. 378]; *Shively* v. *Bowlby* (1894) 152 U.S. 1, 30-31 [38 L.Ed. 331, 342-343, 14 S.Ct. 548]; *Knight* v. *U.S. Land Association, supra,* 142 U.S. 161, 183-184 [35 L.Ed. 974, 981-982]; *San Francisco* v. *LeRoy* (1891) 138 U.S. 656, 670-671 [34 L.Ed. 1096, 1101, 11 S.Ct. 364].)

In my view, the majority gives an artificially narrow reading to these numerous federal decisions in suggesting that the cases are limited to the question of whether California obtained "title" to the tidelands and that they do not bear on the question of whether California acquired an allegedly independent "tidelands trust" interest in this property. As I understand the governing federal tidelands cases, the special "public trust" which adheres in tidelands—and which operates to limit the legislative prerogative in determining to what uses such lands may be put—flows directly from the initial sovereign ownership of these tidelands. (See *Illinois Central Railroad Co.* v. *State of Illinois* (1892) 146 U.S. 387, 452-454 [36 L.Ed. 1018, 1042-1043, 13 S.Ct. 110]; *Martin* v. *Waddell* (1842) 41 U.S. (16 Pet.) 367, 409-414 [10 L.Ed. 997, 1012-1014]; cf. *People* v.

California Fish Co. (1913) 166 Cal. 576, 584-587 [138 P. 79]; *City of Berkeley* v. *Superior Court* (1980) 26 Cal.3d 515, 521-525 [162 Cal.Rptr. 327, 606 P.2d 362]; *State of California* v. *Superior Court (Lyon)* (1981) 29 Cal.3d 210, 226-231 [172 Cal.Rptr. 696, 625 P.2d 239].) Thus, if—as a matter of federal law—California never owned these tidelands in trust for the public, the keystone on which the application of the public trust doctrine rests is missing.[1]

It should be understood, of course, that even in the absence of the public trust doctrine, state and local governments retain broad power to regulate the property in question for environmental, navigational, and recreational purposes and the like. Although this broad regulatory power may not afford the City of Los Angeles authority to enter on and alter defendants' property without compensation, this extensive legislative control does suggest to me that the majority's concern over the problems ostensibly emanating from a "Mason-Dixon coastline" is probably overstated. In any event, the policy considerations which might legitimately influence our decision if this were a matter of state law, clearly cannot override the governing United States Supreme Court decisions on a matter of federal law. Because I find the majority's conclusion inconsistent with those decisions, I dissent.[2]

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[1] I find nothing in the federal cases that would support the conclusion that when the United States issued a federal patent confirming private interests in property acquired pursuant to an earlier grant from Mexico, the federal government—as a matter of federal law—retained a hidden "tidelands trust" interest which later passed to California. (See, e.g., *Knight* v. *U.S. Land Association, supra,* 142 U.S. at pp. 185-189 [35 L.Ed. at pp. 982-984]; *Beard* v. *Federy* (1866) 70 U.S. (3 Wall.) 478, 491 [18 L.Ed. 88, 92].)

[2] Because the majority opinion upholds the trial court's decision on the public trust theory, it does not reach that court's alternative findings that past usage of the property at issue gave rise to a public easement for the passage of fresh water and a dedication for use as public streets or waterways. Since my feelings about these alternative holdings would not affect the outcome of the case in any event, I express no view as to the validity of those conclusions.

APPENDIX A-2

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

June 16, 1982

I have this day filed Order

REHEARING DENIED

In re: L. A. No. 31422
CITY OF L. A.

vs.

VENICE PENINSULA PROP., et al.
(and related case)

Respectfully,

Clerk

APPENDIX A-3

IN THE
SUPREME COURT OF THE
STATE OF CALIFORNIA

L.A. No. 31422

CITY OF LOS ANGELES,
Plaintiff, Cross-defendant and Respondent,

vs.

VENICE PENINSULA PROPERTIES, *et al.*,
Defendants, Cross-defendants and Appellants;
THE STATE OF CALIFORNIA *ex rel.*
STATE LANDS COMMISSION,
Defendant, Cross-complainant and Respondent.

Appeal
COUNTY LOS ANGELES
Superior Court
No. C-868223

The above-entitled cause having been heretofore fully argued, and submitted, it is Ordered, Adjudged and Decreed by the Court that the judgment of the Superior Court of the County of Los Angeles in the above-entitled cause, is hereby afirmed.

Respondents to recover costs on appeal.

I, Laurence P. Gill, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 10th day of May, 1982.

Witness my hand and the seal of the Court, this 17th day of June, 1982.

LAURENCE P. GILL
Clerk

By /s/ R. NICCO
Deputy

APPENDIX A-4

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

The CITY OF LOS ANGELES, a
Municipal Corporation, Plaintiff
and Respondent,

v.

VENICE PENINSULA PROPERTIES,
Defendant and Appellant.

The STATE of California, Acting By and Through
the STATE LANDS COMMISSION,
Cross-Complainant and Respondent,

v.

SOUTHERN CALIFORNIA GAS COMPANY;
Summa Corporation, Cross-Defendants and Appellants.

Civ. 56383.

COMPTON, Associate Justice.

At issue on this appeal is whether, by virtue of the so-called California Tidelands Trust Doctrine, the State of California (State) and its successor in interest, the City of Los Angeles (City) can assert an easement for commerce, navigation and fishery over land which was part of a Mexican land grant and patented by the United States government pursuant to the Act of 1851.[1] We hold that neither the State nor the City possess such an easement over the property in question here.

[1] The Act of 1851 was enacted by Congress to implement the treaty of Guadalupe Hidalgo, by which treaty the government of Mexico ceded to the United States the area which now constitutes the State of California. The Act of 1851 established a mechanism for settling the claims of Mexican citizens to land within the ceded territory.

The instant case involves two lots which are depicted on a subdivision map as Lot C of the Del Rey subdivision, and Lot R of the Silver Strand subdivision. These lots underlie what is now popularly referred to as the Ballona Lagoon (Lagoon) located in the Marina Del Rey area of the City.

The Lagoon in its present configuration is a narrow elongated area covered by very shallow water and is separated from the ocean by a strand or bar of beach sand. Its entire length lies within 1,000 yards of the ocean. It connects to the Venice Canals[2] to the northwest and to the ocean channel entrance to Marina Del Rey on the southeast.

Historically, the name Ballona Lagoon referred to a much larger area than that covered by the property here involved and was part of what was once Rancho Ballona. That additional area is now dry land as a result of filling and development and natural conditions.

Rancho Ballona was granted to Augustin and Ignacio Machado and Philipe and Tomas Talamantes in 1839 by the then Governor of the Californias, which area was part of Mexico. Following the cession of California to the United States by Mexico, the United States in 1873 patented the title of the Machados and Talamantes to Rancho Ballona pursuant to the Act of 1851.

The Summa Corporation, Venice Peninsula Properties, and other individuals (hereafter the property owners) are the present fee owners of Lots C and R and derive their title from the original Mexican grantees. The Southern California Gas Company owns a recorded easement for two pipelines which traverse the property.

The first attempt to establish a public easement over the property did not occur until 1965, when the City filed the instant action for declaratory relief and to quiet title. By virtue

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[2] The Venice Canals were part of an unrelated early subdivision and were designed to provide waterway frontage and access to the lots in the subdivision. The property in question here is not part of that subdivision.

of said easement, the City asserts the right to dredge, construct sea walls, and to make improvements in the Lagoon without the necessity of exercising the power of eminent domain. These proposed improvements would require relocation of the Southern California Gas Company pipelines.

According to the City's complaint, it is entitled to a public trust easement for commerce, navigation and fishery for the reason that the Lagoon is part of the tidelands and is navigable ocean water. As a fallback position, the City also claimed an easement based on express or implied dedication.

The State of California was named as a defendant pursuant to Public Resources Code section 6308 which requires that the state be joined as a necessary party defendant whenever a City brings an action involving tidelands that have been granted to it in trust by the Legislature.

The State filed a cross-complaint for declaratory relief and to quiet title in itself. In reality, however, the interests of the City and the State are compatible with each other and are not adverse. We will, for the sake of convenience, therefore, refer to these governmental entities as the State.

The trial court rendered a judgment for the State declaring (1) the existence of the public trust easement for navigation, commerce and fisheries in, over and upon the waters of the Lagoon up to the line of the Mean High Tide; (2) an easement for passage of fresh sea water through the Lagoon to the Venice Canals; (3) an easement for water recreation; (4) a right in the State and its successors and assigns to open, dredge, construct sea walls, etc., without requirement of the exercise of eminent domain or payment of compensation; (5) a paramount right in the State over the pipeline easement of the Southern California Gas Company; and (6) an easement in the City for public streets and waterways. In summary, however, it can be said that all of the enumerated rights and easements granted to the State by the trial court are simply incidental to and are subsumed by the public trust easement.

Since we conclude that there is no evidence in the record to support any theory of express or implied dedication, the resolution of this appeal turns on whether the State can assert the public trust easement for commerce, navigation and fishery.

In 1852, pursuant to the provisions of the Act of 1851, the Machados and the Talamantes petitioned the Board of Land Commissioners for confirmation of their title. The Board, after hearing, confirmed title in the petitioners in 1854. The Board's decision was affirmed by the United States District Court, and the decision became final in 1856.

The confirmation and patent process next called for a survey of the boundaries of the Rancho. By the time this survey was conducted, certain landmarks referred to in the original grant had disappeared.

Objections by adjoining Rancho owners to the results of the survey resulted in some 17 years of litigation. The litigation mainly concerned the northwestern borders of the grant which had been marked in the original grant by gullies or barrancas, and the southern boundary, which had as one of it landmarks, a low marshy area or creek (estero) which was described as opening into an inner bay.

During the litigation in the patent proceedings this inner bay was described by the Commissioner of the Land Office as not being an arm of the sea. Several witnesses, who testified concerning the boundaries of Rancho Ballona, described the inner bay as pasture land which was periodically flooded by fresh water overflow.

There is no question that the patent which was ultimately issued embraced within its boundaries the entire Lagoon. The westerly boundary of the Rancho was fixed at the high water mark on the westerly side of the sand bar or ridge which separates the present Lagoon from the ocean.

The State concedes that the property owners have valid fee title to Lots C and R, but that such title is subject to the public

trust easement because they were tidelands or submerged lands prior to the original grant.[3]

Although only Lots C and R are involved in the instant litigation, the State asserts that the entire Lagoon, as it existed at the time of the grant, was and still is subject to the public trust easement. Thus, according to the State, even those areas which are now dry land and developed would be so burdened.

For this reason, the California Land Title Association has appeared on appeal as amicus curiae in support of the property owners. That organization points out that there are a number of areas throughout the State, which are similar to the property in question here, on which title insurance has been issued in reliance on the inviolability of the Mexican land grant.

According to the property owners and amicus, if the State, at this late date, can assert a public trust easement over patented land, the result would be chaotic, especially as to land which has been developed without previous objection by the State.

The property owners concede that the federal regulatory power over navigable waters applies to patented Mexican grant land. The property owners also concede that under the Coastal Act, the State of California can regulate the use of such land by the owners. They contend, however, that the recognition of the existence of the public trust easement directly affects the title to such property and its exercise in the manner in which the State proposes here would render the naked fee title valueless and would amount to inverse condemnation.

The so-called Tidelands Public Trust Doctrine is a creature of United States and California law and is an incident of sovereign title in tideland property.

"Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the

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[3] Tidelands are lands between the Mean High Tide and Mean Low Tide, whereas submerged lands are those seaward of the Mean Low Tide and not uncovered in the ordinary ebb and flow of the tide. (*City of Long Beach v. Mansell*, 3 Cal.3d 462, 91 Cal.Rptr. 23, 476 P.2d 423.)

title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory." (*Knight v. United Land Association,* 142 U.S. 161, at 183, 12 S.Ct. 258, at 263, 35 L.Ed. 974.)

Thus California acquired title to navigable waterways and tidelands by virtue of its sovereignty when admitted to the Union in 1850. (*Borax, Ltd. v. Los Angeles* (1935) 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9.) This exercise of sovereignty was as a trustee for the public rather than in a proprietary capacity. (*City of Long Beach v. Mansell, supra; People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79; *People v. Kerber* (1908) 152 Cal. 731, 93 P. 878; *Ward v. Mulford* (1867) 32 Cal. 365.)

"The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." (*Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, at 453, 13 S.Ct. 110, at 118, 36 L.Ed. 1018; also see *United States v. Coronado Beach Co.,* 255 U.S. 472, 41 S.Ct. 378, 65 L.Ed. 736; *Whitney v. United States,* 181 U.S. 104, 21 S.Ct. 565, 45 L.Ed. 771; *United States v. Cambuston,* 61 U.S. (20 Howard) 59, 63, 15 L.Ed. 828.)

"As to tide-lands, although it may be stated as a general principle ... that the titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their ownership and right of disposition passed to it upon its admission into the Union, that doctrine cannot apply to such lands as had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way." (*San Francisco v. Le Roy* (1891) 138 U.S. 656, at pp. 670-671, 11 S.Ct. 364, at p. 368, 34 L.Ed. 1096.)

Our reading of the cases leads us to conclude that the public trust easement only exists over lands to which California acquired title by virtue of its sovereignty upon admission to the Union. California did not acquire such title to lands which were the subject of a prior Mexican land grant and later patented by

the United States government in accordance with its obligations under the treaty of Guadalupe Hidalgo.

The nature and effect of the patent issued pursuant to the Act of 1851 has been well described by both the United States and California Supreme Courts. The patent of the government is evidence of title and is conclusive against the government and all persons claiming under it. The patent is a deed of the United States and operates as a quit claim of any interest the United States may have reserved in the land. It establishes in the grantee full and *complete* title to the property. (*Beard v. Federy* (1865) 70 U.S. (3 Wall.) 478, 18 L.Ed 88; *Teschemacher v. Thompson* (1861) 18 Cal. 11.)

Further, there appears to be no question but that a federally patented Mexican land grant could embrace tidelands. The State concedes this and it has been so held in *United States v. Coronado Beach Co., supra,* and *San Francisco v. Le Roy, supra.*

In *United States v. Coronado Beach Co., supra,* we find language which in our opinion is controlling of the issue of whether the patented fee title is subject to an unreserved servitude, which exists only as an adjunct of sovereignty. That case involved land which had been granted by the Mexican government to one Carrillo and patented by the United States government to Carrillo. The grant covered a portion of North Island in San Diego County and included tidelands bounded seaward to the "anchorage for ships."

The United States, in attacking the validity of the patent as to tideland property, argued that, as here, California became a state prior to the date of the patent and thus its sovereignty over the land existed in spite of the later patent. The Supreme Court there declared that California's title, upon becoming a state, was subject to prior Mexican land grants and that California title was held in abeyance pending determination of the validity and boundaries of the Mexican grant in proceedings established by the Act of 1851.

Further, the United States in that case, challenged the boundaries of the grant insofar as it embraced tidelands. The Supreme Court's answer to that contention was that in the

confirmation proceedings there was jurisdiction to decide the issues, right or wrong, and ". . . however arrived at [the decision] was adopted by the United States for its grant and it cannot now be collaterally impeached." (*United States v. Coronado Beach Co., supra,* (1921) 255 U.S. 472, at 488, 41 S.Ct 378, at 379, 65 L.Ed 736.)

It must be emphasized that in the confirmation and patent proceedings under the Act of 1851, the United States was always a party and in a position to assert any interest it claimed to have in the property including any easement claimed by virtue of sovereignty. This is especially significant in the case at bench because the character of the land was, itself, an issue in the confirmation proceedings and was at that point determined not to be tidelands. Thus it was error for the trial court here to permit evidence to be introduced to controvert that determination.

In *United States v. Title Ins. Co.* (1924) 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110, the Supreme Court of the United States dealt with the claims of certain Indians to the right to occupy land which was the subject of a federally patented Mexican land grant. The Indians' right to occupancy was said to have existed under Mexican law and it was contended that it survived or continued after the patenting process, even though no such reservation was mentioned in the patent.

The Supreme Court, relying on its former decision in *Barker v. Harvey* (1901) 181 U.S. 481, 21 S.Ct. 690, 45 L.Ed. 963, rejected the claim and held that any such right of occupancy would have had to have been asserted in the patenting process. The court at page 492, 21 S.Ct. at page 694 stated "[A] claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy."

The above cited cases are a complete answer to the State's argument here that only the fee title was settled by the patent process and that the public trust easement exists independent of that patent process. It is difficult for us to see how the patent

can be described as settling in the grantee a full and *complete* title, while at the same time holding that it was burdened by a servitude of the magnitude of that asserted by the State in this action.

Inasmuch as California never acquired sovereign title to land which was the subject of a prior grant by the Mexican government, the public trust easement, which is an adjunct of sovereignty and a creature of United States and California law, never arose.

The State, by way of a corollary argument, contends that under Mexican law the tidelands could not be subject to private ownership. Thus it argues that there existed under Mexican law a doctrine similar to the California Tidelands Trust Doctrine and that by virtue of that doctrine, the public trust easement passed to the United States upon cession of California by the government by Mexico.

We need not here discuss the Mexican law because any contention that Mexican law is controlling of the scope and effect of the United States patenting process has been laid to rest by decisions of the United States and California Supreme Courts.

In the case of *Moore v. Smaw* (1861) 17 Cal. 199, the United States sought to claim mineral rights in land which was part of a Mexican land grant patented by the United States under the Act of 1851. The argument there was that under Mexican law, mineral rights did not pass to the grantee but instead remained with the government. The California Supreme Court rejected that argument by declaring that there was nothing in the Act of 1851 which restricted the operation of the patents to the interest acquired by claimants from the former government. The court held that all the interest of the United States, whatever it may have been, and everything connected with the soil or any portion of it, or everything lying over it or under it, was conveyed to the grantee by the United States in the patent process.

In *Thompson v. Los Angeles Farming & Milling Co.* (1901) 180 U.S. 72, 21 S.Ct. 289, 45 L.Ed. 432, an attempt was made to

invalidate a federal patent under the Act of 1851 by asserting that Mexican law, at the time of the grant, gave the Governor of California no authority to dispose of certain land in question. The contention was that the Mexican grant was, in effect, void and that the federal patent was likewise void. The Supreme Court in rejecting that argument stated it was the purpose of the Act of 1851 to give final and complete repose to titles. "It was enacted not only to fulfil our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain . . . . Upon the confirmation of the claim by the commissioners or by the District or Supreme Court, a patent was to issue and be conclusive against the United States." (Pp. 77-78, 21 S.Ct. p. 291.)

The California Legislature has clearly recognized the highly protected status of the Mexican land grant — a status which inures from a treaty obligation of the United States — in its enactment by which the State's interest in the tidelands was conveyed to the City of Los Angeles, as a successor to the City of Venice.

Chapter 1513 of the Statutes of 1945, granted to the City of Los Angeles as successor to the City of Venice, *"all right, title and interest of the State of California* held by said State by virtue of its sovereignty in and to all the tidelands and submerged lands . . ." That statute, however, contained the following:

". . . excepting any property held under, through or from a Mexican grant or patent . . ."

Chapter 77 of the Statutes of 1917, which effected the original conveyance of the State's interest to the City of Venice similarly provided that ". . . nothing contained herein shall in any way affect any property held or claimed under, through or from a Mexican grant or patent therefor within the present boundaries and jurisdiction of said city . . ."

We conclude that the State does not have a public trust easement for commerce, fishing and navigation in the Lagoon, since it never had sovereign title to the property. That conclusion dictates that the judgment must be reversed since the record here is devoid of any evidence to support a finding of

express or implied dedication or any other basis for the various subordinate easements which the trial court attempted to create.

The evidence is quite clear that the Venice Canals are, and have been for a long period of time, stagnant polluted bodies of water receiving no sea water flow through the Lagoon. Inasmuch as the State, under our holding here, has no right to dredge or improve the flow through the Lagoon, an easement simply for sea water flow would be worthless.

As to claim that the public has obtained a prescriptive right to use the Lagoon for recreational purposes under the rationale of *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, 84 Cal.Rptr. 162, 465 P.2d 50, we find that case to be inapplicable.

Contrary to the situation in *Gion*, the Lagoon here is neither a "beach or shoreline" nor a public road, nor as we have indicated, is it a part of navigable ocean waters. Further, there is no evidence of public use which even approximates the extent of the public use in *Gion*.

In the absence of an express dedication to public use, it must be presumed that no property owner in fact desires, without compensation, to dedicate his property to public use to the extent that he would lose, for all times, his right to make private use thereof.

Here it is undisputed that the property owners did not in fact intend to dedicate the property to public use. They posted "no trespass" signs as evidence of that lack of intent. In our opinion, they should not now be penalized simply because they did not erect an unsightly and forbidding fence manifesting a continuing hostility to even sporadic and limited public use. To imply an intent to dedicate, under these circumstances, would defy logic, ignore reality and stand equity on its head.

The judgment is reversed.

BEACH, J., concurs.

FLEMING, Acting Presiding Justice, dissenting.

In my opinion a public trust easement for navigation, commerce, and fishery has existed since 1839 and continues to exist

in the property identified as Ballona Lagoon, for the reason that throughout this period it has been tidewater property. A public trust easement attaches to all tidewater and tideland property, and the rule is the same under Mexican law (*Lux v. Haggin* (1886) 69 Cal. 255, 316, 317, 4 P. 919), United States law (*Illinois Central Rd. v. Illinois* (1892) 146 U.S. 387, 455-460, 13 S.Ct. 110, 115, 36 L.Ed. 1018), and California law (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521, 162 Cal.Rptr. 327, 605 P.2d 1328; *Marks v. Whitney* (1971) 6 Cal.3d 251, 259, 98 Cal.Rptr. 790, 491 P.2d 374).

Ballona Lagoon, a narrow inlet or estuary of the sea connected with and directly parallel to the sea, has been tidewater and tideland for the past 900 years. It was shown as the estuary of a larger "Inner Bay" on the original Hancock survey of Ballona rancho in 1858 and on the coastal surveys of 1876, 1887, and 1896. Subdivision of the surrounding land in 1905 did not change its character as tidewater property, which it remains to this day with waters controlled by motorized tide gates abutting the ocean channel leading to Marina Del Rey. Appellants make two arguments against the existence of a public trust easement: (1) Ballona Lagoon is not tidewater and tideland, (2) the fee title confirmed in their predecessors in interest by the federal Board of Land Commissioners and the United States General Land Office extinguished all public trust easements in the Ballona rancho grant.

1. According to appellants, the non-tidal character of Ballona Lagoon was conclusively established in 1873 in the General Land Office patent proceeding confirming their predecessors in interest's title to Ballona rancho, when Commissioner Drummond commented that the "Inner Bay" of Ballona rancho was not an arm of the sea but was largely pasturage. That comment, however, referred to a different area of the rancho, its "Inner Bay" located north and east of the estuary, an area removed from the sea and not directly adjoining it. In that same patent proceeding Commissioner Drummond specifically mentioned "an estuary of the sea in the Ballona rancho," which is the property involved here. Commissioner Drummond's comment about the "Inner Bay," made in the course of a title proceeding

to settle the northern and western boundaries of the Ballona rancho, merely considered the extent of tidewater penetration into the rancho as a factor in determining the rancho's boundaries. It cannot rationally be interpreted as a repudiation of the existence of the "estuary of the sea in the Ballona rancho" mentioned in another part of his report.

Other than the Drummond comment, appellants offer no proof of the non-tidal character of Ballona Lagoon. This is scarcely surprising, because the physical evidence is all the other way. Factually, the trial court's finding that the property is tidewater was supported by overwhelming proof, not the least of which was evidence of the presence of clams and the practice of clamming in Ballona Lagoon. Because the property was and is tidewater property, an easement for navigation, commerce, and fishery attaches.

2. Appellants further argue that whether Ballona Lagoon is tidewater or not, their full title to the property was conclusively determined by the General Land Office patent proceedings which confirmed title and boundaries of the original Mexican land grant in their predecessors in interest. But appellants' title is not contested. The disputed issue is whether a public trust easement in tidal property can exist when full title to a Mexican land grant has been confirmed in private ownership. Appellants assert that confirmation of the grant gave them title without limitation and reservation, relying on the case of *United States v. Coronado Beach Company* (1921) 255 U.S. 472, 41 S.Ct. 378, 65 L.Ed. 736. That case held that the Mexican grant at issue was bounded on the "west by the anchorage for ships" and therefore included title to adjacent tidelands. But the existence of a public trust easement in tidelands for navigation, commerce, and fishery was not an issue in the cause and was never discussed (see p. 484). I see nothing inconsistent in recognition of fee title in Mexican-land-grant tidal property and recognition of a public trust easement in the same property (*Lewis Blue Point Oyster Co. v. Briggs* (1913) 229 U.S. 82, 87, 88, 33 S.Ct. 679, 680, 681, 57 L.Ed. 1083; *People v. California Fish Co.* (1913) 166 Cal. 576, 586-587, 598, 138 P. 79.) At bench, the Ballona rancho

grant was specifically made "without prejudice ... to servitudes." Such a reservation, in my view, included a public trust easement in those portions of the grant which were tidal property, (*Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 452-455, 13 S.Ct. 110, 117, 36 L.Ed. 1018; *Townsend v. Greeley* (1866) 72 U.S. (5 Wall.) 326, 335, 18 L.Ed. 547; *New Orleans v. United States* (1836) 35 U.S. (10 Peters) 662, 731, 9 L.Ed. 573), a reservation which the subsequent General Land Office proceeding confirming title and boundaries did not disturb. (Cf. *Fremont v. United States* (1854) 58 U.S. (17 How.) 542, 565, 15 L.Ed. 241.)

Appellants, joined by California Land Title Association as amicus curiae, conjure up the spectre that recognition of public trust easements in properties which were tidal at the time Mexico ceded California to the United States would disrupt a myriad of good titles to property which has since been filled and improved in reliance on the validity of a Mexican-land-grant fee title. But I forsee no parade of horribles resulting from recognition of public trust easements in Mexican-land-grant tidal property. The California Supreme Court effectively laid such hobgoblins to rest in *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 162 Cal.Rptr. 327, 605 P.2d 1328, a cause which involved state conveyances of tidelands to private ownership under a legislative act of 1870. The court there held a public trust easement for navigation, commerce, and fishery was reserved under such conveyances, that grantees of tidelands took their grants subject to such reservations. The court then went on to declare that tideland properties which have since been filled or reclaimed are free of the public trust easement to the extent they no longer comprise tidelands and are no longer adaptable to public trust uses. (pp. 534-535, 162 Cal.Rptr. 327, 605 P.2d 1328.) In effect, the court determined that long-continued occupation of tidelands by a fee owner, adverse to tideland use and accompanied by action which terminates the tidal character of the property, may also terminate the public trust easement for navigation, commerce, and fishery. While the court did not elaborate the exact nature of the legal principle involved, clearly it relied on the presence of factual

elements comparable to those which establish prescription, adverse possession, abandonment, or equitable estoppel. (Cf. *People v. California Fish Co.* (1913) 166 Cal. 576, 597, 138 P. 79; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497, 499, 91 Cal.Rptr. 23, 476 P.2d 423; see "The Tideland Trust," (1974) 21 UCLA L.Rev. 826, 838-842, 850.)

The foregoing principle applies equally here. Property which was tidal at the time of its original Mexican grant and at the time of its patent by the General Land Office remains subject to a public trust easement for navigation, commerce, and fishery. But if during the intervening years the property has lost its tidal character, even if the loss resulted from action of the fee owner in damming, filling, and improving the property, the public trust easement ordinarily disappears. The operation of this principle may be seen in the present cause, where a century ago the tideland area of Ballona was considerably more extensive that it is today. As to those parts of Ballona rancho which lost their tideland character, such as the "Inner Bay," the public trust easement disappeared; as to those parts of Ballona Lagoon which retain their character as tideland or tidewater, the public trust easement remains.

3. The trial court also found Ballona Lagoon subject to a variety of other easements—for passage of sea water to the Venice Canals, for public waterways, for recreational use, for boating, clamming, and swimming. Whether the evidence was sufficient to support the existence of these easements is a question I do not reach, since the parties agree that a decision in favor of the public trust easement makes unnecessary a determination of the validity of these subsidiary easements.

I would affirm the judgment below on the basis of a public trust easement in tidewater property.

APPENDIX A-5

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

THE CITY OF LOS ANGELES, a municipal corporation *Plaintiff,* vs. ETHEL FRASER CARMAN-RYLES, et al., *Defendants.*	No. 868,223 FINDINGS OF FACT AND CONCLUSIONS OF LAW (Pending Action — Department 23)

The above-entitled case came on regularly for trial commencing on February 18, 1975, before the Honorable Samuel Greenfield, Judge presiding in Department 23 of the above-entitled Court, without a jury. Burt Pines, City Attorney, Norman L. Roberts, Assistant City Attorney and Anthony P. Parrille, Deputy City Attorney, by Anthony P. Parrille, appeared for plaintiff and cross-defendant, the City of Los Angeles. Loren Miller, Jr., William A. Dorland and Jack D. Janofsky, by William A. Dorland, appeared for defendant and cross-defendant, Southern California Gas Company. Hill, Farrer and Burrill, William M. Bitting and Steven W. Bacon, by William M. Bitting and Steven W. Bacon, appeared for defendant and cross-defendant Summa Corporation (formerly known as "Hughes Tool Company.") Evelle J. Younger, Attorney General, Alan V. Hager and Jerold Krieger, Deputy Attorneys General, by Jerold Krieger, appeared for defendant and cross-complainant, the State of California. Pacht, Ross, Warne,

Bernhard and Sears, Inc., by Henry J. Shames and Paul Hamilton, appeared for defendant and cross-defendant, Venice Peninsula Properties. David J. Pierce of the law firm of Mitchell and Mitchell, appeared for defendants and cross-defendants, Ruth Jones-Wright, and Robert D. Byrne and Byrne C. Manson as Trustee under the Will of Olive Byrne Jones, deceased.

Pursuant to stipulation of the parties and good cause appearing therefor, on April 24, 1975, trial of the matter was ordered bifurcated. Thereafter, between April 24, 1975 and May 13, 1975, the Court heard the testimony and examined the proof offered by the parties pertaining to the first stage of the trial.

On November 18, 1975, the Clerk of the Court entered this Court's Notice of Intended Decision in the Minutes of the Court. The City of Los Angeles requested Findings of Fact and Conclusions of Law, and the Court ordered the defendant, Summa Corporation to prepare the Findings of Fact and Conclusions of Law at that time. On June 25, 1976, the Court vacated its Notice of Intended Decision filed on November 18, 1975 with respect to the first stage of the two bifurcated issues in the trial; and ordered the reopening of the first stage for the purpose of taking testimony as to the geographical boundaries of the easements claimed by the City and cross-complainant State in the "portion of Lot C of the Del Rey Beach Subdivision lying northwesterly of the Entrance Channel of Marina Del Rey." Thereafter, on August 23, 1976, September 27, 1976, and October 18, 1976, the Court heard additional testimony and examined the proofs offered by the parties pertaining to the remaining issues of the first stage of the trial.

On October 19, 1976, the Clerk of the Court entered the Court's Revised Notice of Intended Decision on Certain Factual Issues Tried In Connection With The First Stage Of The Bifurcated Trial in the Minutes of the Court. Under its Revised Notice of Intended Decision, the Court has ordered that counsel for the City and for the State jointly prepare, serve and lodge with the clerk in Department 23, proposed Findings of Fact and Conclusions of Law on the first stage of the Trial.

The Court being fully advised, now makes its Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

It is true that:

1. The subject of this litigation commonly known as and hereafter referred to as the 'Ballona Lagoon' is an arm of the Pacific Ocean which was created by forces of nature over 900 years ago and has continued to exist at all times to the present. Since its creation, and to the present, it has been subject to the tides of the Pacific Ocean and inundated with seawaters at mean low-tide and mean high-tide. The waters within the Ballona Lagoon, at mean high-tide, are of sufficient depth to be navigated by rowboats, canoes, surfboards and other shallow-draft craft. Ballona Lagoon is therefore a navigable body of water. Ballona Lagoon may be made more usable for navigation and commerce purposes, including the navigation and mooring of sailboats and motor-cruisers.

2. Since 1873 and at various times thereafter, construction work, including dredging and building of seawalls and dikes in and about the Ballona Lagoon has been commenced and carried on. The permanent construction of facilities within the confines of the Ballona Lagoon as depicted on Exhibit 14, occurred southerly of the portions in litigation herein. Persons or entities constructed such facilities in and about the Ballona Lagoon in a manner that tidal influence within the Ballona Lagoon was protected and sustained. Construction work completed within territory surrounding the Ballona Lagoon or upon the banks of the Ballona Lagoon (referring to the portion of the Lagoon in litigation herein) did not substantially affect the size, shape, depth, location or character of the Lagoon.

3. The ebb and flow of the tides within the Ballona Lagoon are preserved and protected by the installation and operation of automatic, motor-controlled tidegates which are installed in the northerly bank of the Marina del Rey Entrance Channel (the southerly boundary of the property which is the subject of this litigation.) Waters of the Pacific Ocean enter the Lagoon by and

through the Marina del Rey Entrance Channel. Said tidegates are operated in such a manner as to limit the maximum amount of tidal water entering the Lagoon at highest high-tide, to prevent the flooding of areas adjacent to the Ballona Lagoon.

4. The waters of the Ballona Lagoon are a habitat for a variety of marine life, including several varieties of clams and shrimp. Clams obtained from the Lagoon are edible and have been and are still being taken for both private consumption and commercial use. The waters of the Ballona Lagoon also provide a habitat for migratory birds.

5. The Ballona Lagoon and the waters of the Ballona Lagoon are of scenic value to the community and enhance the aesthetics and value of adjacent properties. The Ballona Lagoon has value for scientific study and research as an estuarine area of ecological value. Properties adjacent or near the Lagoon have value and usefulness in excess of those separated from the Lagoon by distance.

6. Formerly the waters of the Ballona Lagoon were utilized as the means of disposing and flushing of brine and other waste products from oil-well operations conducted within the vicinity of the Lagoon. Brine was discharged into the Lagoon at ebbtide and flushed into the waters of the Pacific Ocean. That use of the Ballona Lagoon has been discontinued.

7. Lot C of Del Rey Beach Subdivision as recorded in Book 6, page 186 of Maps in the Office of the Recorder of Los Angeles County and Lot R of Silver Strand Subdivision as recorded in Book 7, page 86 of Maps, in the Office of the County Recorder of Los Angeles County, originated from a grant of Mexican land by the Governor of California in 1839 and thereafter confirmed by decree of the United States District Court pursuant to statutes enacted to implement the Treaty of Guadalupe Hidalgo.

During the time of sovereign control of California by Mexico, the body of law governing the ownership of lands covered by water was Law 3 and Law 6 of *Las Siete Partidas* (in evidence, Exhibit 5). Under those laws a private person could not have any property interest in land covered by the sea, the harbors

and the running rivers. The Ballona Lagoon, at the time of the Mexican grant and during Mexican sovereignty, was covered by water and subject to the daily ebb and flow of waters of the Pacific Ocean. Therefore, while subject to Mexican sovereignty, and under Mexican law, the grantees of said grant had no property interest in the lands known as the Ballona Lagoon.

By Chapter 77 of Statutes of California, 1917, and Chapter 1513 of Statutes of California, 1945, the State granted all tidelands and submerged lands within the City of Venice to Venice and its successors. Both statutes provide in substance that nothing contained therein shall in any way affect any property held or claimed under, through or from a Mexican grant or patent therefor.

8. The Ballona Lagoon has been the source of the flow of seawater to and from the canals northerly of the Ballona Lagoon for more than five years prior to the commencement of this action.

9. Members of the public have used the Ballona Lagoon for more than five years for purposes consistent with the easement of navigation, commerce and fishery and as though such easement was vested in the public. These uses and purposes included:

(1) Clam-digging for recreational and commercial purposes;

(2) Swimming;

(3) Boating for recreational purposes;

(4) Scenic enjoyment;

(5) A means of flushing brine into the sea; and

(6) A route for passage of tidal-waters to and from the Venice Canals.

Said uses were open, notorious and were known or should have been known by the owners or others claiming an interest in the Ballona Lagoon. Persons used the Ballona Lagoon in the same manner as they would have used it had it been publicly-owned property, and they were under a belief that it was such.

10. The State of California, through wardens of its Department of Fish and Game, enforced the provisions of the Fish and Game Code of California in the Ballona Lagoon relating to fishing.

11. The owners' efforts, if any, to prevent the usage of the Ballona Lagoon by the public for the aforesaid purposes have been sporadic, minimal, and unsuccessful. Said efforts when they occurred consisted of the posting of "No Trespassing" signs, but without further enforcement.

12. All portions of the Ballona Lagoon are located within 1,000 yards of the mean high-tide line of the Pacific Ocean.

13. Exhibit 89 describes by metes and bounds the geographical boundaries of the easement claimed by the City and State in that portion of Lot C of the Del Rey Beach Subdivision lying northwesterly of the Entrance Channel of Marina lel Rey. Said description is attached hereto and incorporated by reference.

14. The subdivision map of Del Rey Beach Subdivision depicts a large lot, designated as Lot C, irregularly drawn and different in shape and size from the lots proposed for a sale in said subdivision. The map of Silver Strand Subdivision depicts a large lot, designated as Lot R, irregularly drawn and different in shape and size from lots proposed for sale in Silver Strand Subdivision. The boundaries of said Lots C and R, except for those boundaries which correspond to the boundaries of the subdivision, approximately correspond to the shores of the Ballona Lagoon. The map of Del Rey Beach Subdivision plats a walkway immediately adjacent to Lot C and immediately next to the shore of the Ballona Lagoon labeled 'Esplanade East' and 'Esplanade West' at the edge of Lot R, but excluding the most westerly side of Lot R and along the banks of the Ballona Lagoon (excluding the most westerly bank.)

Lots C and R in the aforesaid subdivisions could have no other use and no other value than as a waterway. Lots C and R, together with Lot A of the adjacent Playa del Rey Townsite located southerly of Del Rey Beach Subdivision connected to one another and corresponded to the shape and size of the entire Ballona Lagoon. The use of the term 'esplanade' implied that

the rights-of-way so identified were to be along a shore and immediately adjacent to a waterway.

15. The subdividers of the Del Rey Beach Subdivision surveyed the boundaries of said Lot C intending to make the shores of the Ballona Lagoon the boundaries of said Lot C, and platted those boundaries in straight lines and regular curves, rather than irregular or complex curves, in accordance with survey practices in 1905.

16. The subdividers of Silver Strand Subdivision and Del Rey Beach Subdivision each sold some of the platted lots in their respective subdivisions. Lots C and R provide a means of ingress and egress by water to the lots which abut on the East and West, and Lot C (the Lagoon) was intended to be the 'frontage' of lots in Del Rey Beach and adjoining the 'Esplanades.'

17. Following the subdivision of Del Rey Beach and Silver Strand and following the platting of Lots C and R therein, and following the platting of the Grand Canal leading northerly from Lot R, lands were subdivided northerly of the northerly limit of Silver Strand Subdivision. Said subdivisions included areas designated as canals, and canals were actually constructed within said designated areas. (Said canals are known today as the "Venice Canals.") Some of the canals which were constructed continue to exist to this date and provide water access to abutting lots. At the time of recordation of said subdivisions and at the time of the construction of the canals, the major source of waters for the canals during dry seasons was through the Ballona Lagoon, and a secondary source was a canal located at the seaward terminus of Venice Boulevard. Another source, during rainstorms, was the flow of surface water from adjacent lands. For approximately the last 50 years the sole source of water has been through the Ballona Lagoon.

18. Each of the subdividers of the 'canal' subdivisions northerly of Silver Strand, as well as the public who purchased properties within said subdivisions, and the public itself, relied on the continued existence and the maintenance of Lots C and R (the Ballona Lagoon) as a passageway for seawater to and

from the Pacific Ocean. Said reliance was the construction of the canals in the manner in which they were constructed and their connection to the Grand Canal in Silver Strand Subdivision and thereby to the Ballona Lagoon.

19. Defendant and cross-defendant Summa Corporation is the owner of Lot C of the Del Rey Beach Subdivision as recorded in Book 6, page 186 of Maps, in the office of the recorder of Los Angeles County. Defendant and cross-defendant Southern California Gas Company possesses certain easements and other interests of record to said Lot C.

20. Defendants and cross-defendants Robert D. Byrne and Byrne C. Manson, as trustees under the Will of Olive Byrne Jones, deceased, Ruth Jones-Wright, and Venice Peninsula Properties are owners of Lot R of Silver Strand Subdivision as recorded in Book 7, page 86 of Maps in the office of the recorder of Los Angeles County.

21. The aforesaid Lot R and the aforesaid Lot C are located in and are a part of an area which has historically been known as "Ballona Lagoon," and together the aforesaid Lot R and the aforesaid Lot C comprise that area which is the subject matter of the within action (hereinafter "subject property.") The subject property lies within the City of Los Angeles, County of Los Angeles, State of California.

22. The subject property is a portion of "Rancho La Ballona," lands originally granted to Augustin and Ignacio Machado, and Felipe and Tomas Talamantes in 1839 by Juan B. Alvarado, the then Constitutional Governor of the Californias.

23. On February 2, 1848, the United States and Mexico entered into the Treaty of Guadalupe Hidalgo. Article VIII of that Treaty provided that existing property rights of Mexican citizens would be "inviolably respected," and on March 3, 1851, Congress passed "An Act to ascertain and settle private land claims in the State of California" (hereinafter "Act of 1851.") That Act of 1851 provided a method by which property rights of Mexican citizens in and to lands in the new State of

California could be could be confirmed and patented by the United States Government.

24. In accordance with the provisions of said Act of 1851, on October 2, 1852, Augustin Machado, *et al.*, petitioned the then Board of Land Commissioners for a decree confirming title to "Rancho La Ballona" in them. On February 14, 1854, after hearing, the Board confirmed title to "Rancho La Ballona" in Augustin Machado, *et al.*, and, after appeal by the United States, on December 19, 1855, the United States District Court for the Southern District of California upheld the Board's decision. No further appeal was taken, and in December of 1856 the District Court entered an order making its 1855 Order final.

25. Defendants and cross-defendants Summa Corporation, Venice Peninsula Properties, Ruth Jones-Wright, Robert D. Byrne and Byrne C. Manson, as trustees under the Will of Olive Byrne Jones, deceased, and Southern California Gas Company derive their title to their interests in the subject property from the aforesaid Augustin and Ignacio Machado, and Felipe and Tomas Talamantes.

26. Defendants and cross-defendants Summa Corporation, Venice Peninsula Properties, Ruth Jones-Wright, Robert D. Byrne and Byrne C. Manson, as trustees under the Will of Olive Byrne Jones, deceased, and Southern California Gas Company have never offered, intended to offer or attempted to offer to dedicate the subject property or any portion thereof for any purposes.

27. Members of the public have used a portion of the Ballona Lagoon, in the immediate vicinity of the tide gate, for more than five years for recreation and clam digging. This use was open and notorious. This use did not interfere with the operation and use of pipelines crossing beneath the Lagoon, which pipelines have been in use from prior to 1943 until the present time.

28. Any conclusion of law deemed to be a Finding of Fact is hereby incorporated in these Findings of Fact.

CONCLUSIONS OF LAW

From the foregoing facts the Court concludes that:

1. The State of California holds in trust for the people of the State of California an easement for navigation, commerce and fisheries in, over, upon and under the waters of the Ballona Lagoon up to the line of the mean high-tide within portions of Lot C of the Del Rey Beach Subdivision, more particularly described in the exhibit to these Findings of Fact and Conclusions of Law.

2. The public has an easement in the same portions of Lot C for the passage of fresh seawater from the Pacific Ocean through the Ballona Lagoon to the Venice Canals.

Said portions of Lot C are subject to an easement for general purposes of water recreation.

The same public easement exists in Lot R of Silver Strand, the boundaries of which are to be determined in the second portion of these bifurcated proceedings.

3. In the administration of the public easement referred to in Conclusion Number 1, the State of California, or its successors and assigns, has the right to open, dredge, construct sea walls, or otherwise improve the subject property without prior exercise of the power of eminent domain or payment of compensation.

4. The right of the State of California is paramount to the rights of the Southern California Gas Company, the holder of a pipeline easement within the portion of Lot C of Del Rey Beach Subdivision described in Exhibit 89.

5. The confirmation decree of the United States District Court with respect to the said Mexican grant of Rancho Ballona pursuant to the Treaty of Guadalupe Hidalgo was and is conclusive as to the title and boundaries of the land subject to the confirmation, but not as to the rights the patentees may have in the land. Said patent issued pursuant to said decree was subject to the sovereign right of the public to use the Ballona Lagoon for purposes of navigation, commerce and fishery.

6. The subdividers of Del Rey Beach Subdivision and Silver Strand Subdivision by recordation of the tract maps dedicated Lots C and R as public streets or waterways. The dedication of Lots C and R was accepted by the sale of some of the lots abutting Lots C and R, and by public use of Lots C and R.

DATED February 22, 1977

/s/ Samuel Greenfield
JUDGE OF THE SUPERIOR COURT

[Exhibit to Findings of Fact]

MEAN HIGH TIDE LINE OF THAT PORTION OF THE BALLONA LAGOON WITHIN LOT C, DEL REY BEACH

That portion of Lot C, Del Rey Beach, per map recorded in Book 6, page 186 of Maps, in the office of the County Recorder of Los Angeles County, bounded and described as follows:

Commencing at a point in the northwesterly line of Lot 16, Block 1, said Del Rey Beach, distant 105.38 feet northeasterly measured along said northwesterly line and its southwesterly prolongation from a line parallel with and distant 20 feet southwesterly measured at right angles from the southwesterly line of said Lot 16, said parallel line is to have a bearing of South 29° 17' 00" East for purposes of this description; thence southeasterly in a direct line to a point in a line having a bearing of North 59° 01' 38" East, said last-mentioned line to be known as Line "A" for purposes of this description, distant 108.00 feet northeasterly measured along said Line "A" from the southeasterly prolongation of said parallel line, said Line "A" passes through a point, to be known as Point "A" for purposes of this description, in said southeasterly prolongation distant South 29° 17' East 75.50 feet measured along said southeasterly prolongation from said southwesterly prolongation of the northwesterly line of Lot 16; thence southeasterly along a direct line to the TRUE POINT OF BEGINNING for purposes of this description in the southwesterly line of said Lot C, said last-mentioned direct line passes through a point in the northeasterly prolongation of a line parallel with and distant 20 feet southeasterly measured at right angles from the southeasterly line of Lot 19, said Block 1, said last-mentioned parallel line to be known as Line "B" for purposes of this description, distant 136.35 feet northeasterly measured along said Line "B" from its point of intersection with said southeasterly prolongation, having a bearing of South 29° 17' East, said point of intersection to be known as Point "B" for purposes of this description; thence southeasterly in a direct line to a point in a line having a bearing of North 59° 05' 00" East, said last-

mentioned line to be known as Line "C" for purposes of this description, distant 144.56 feet northeasterly measured along said Line "C" from the southeasterly prolongation of said parallel line having a bearing of South 29° 17' East, said Line "C" passes through a point to be known as Point "C" for purposes of this description, in said southeasterly prolongation distant south 29° 17' East 117.50 feet measured along said southeasterly prolongation from said Point "B"; thence southeasterly in a direct line to a point in the northeasterly prolongation of a line parallel with and distant 20 feet southeasterly measured at right angles from the southeasterly line of Lot 20, Block 2, said Del Rey Beach, said last-mentioned parallel line to be known as Line "D" for purpose of this description, distant 149.77 feet northeasterly measured along said Line "D" from its point of intersection with said southeasterly prolongation, said point of intersection to be known as Point "D" for purposes of this description; thence southeasterly in a direct line to a point in a line having a bearing of North 59° 05' 23" East, said last-mentioned line to be known as Line "E" for purposes of this description, distant 152.98 feet northeasterly measured along said Line "E" from said southeasterly prolongation, said Line "E" passes through a point, to be known as Point "E" for purposes of this description, in said southeasterly prolongation distant South 29° 17' East 117.56 feet measured along said southeasterly prolongation from said Point "D"; thence southeasterly in a direct line to a point in the northeasterly prolongation of a line parallel with and distant 20 feet southeasterly measured at right angles from the southeasterly line of Lot 20, Block 3 said Del Rey Beach, said last-mentioned parallel line to be known as Line "F" for purposes of this description, distant 145.19 feet northeasterly measured along said Line "F" from its point of intersection with said southeasterly prolongation, said point of intersection to be known as Point "F" for purposes of this description; thence southeasterly in a direct line to a point in a line having a bearing of North 59° 05' 15" East, said last-mentioned line to be known as Line "G" for purposes of this description, distant 154.40 feet northeasterly measured along said Line "G" from

said southeasterly prolongation, said Line "G" passes through a point, to be known as Point "G" for purposes of this description, in said southeasterly prolongation distant South 29° 17' East 117.57 feet measured along said southeasterly prolongation from said Point "F"; thence southeasterly in a direct line to a point in the northeasterly prolongation of a line parallel with and distant 20 feet southeasterly measured at right angles from the southeasterly line of Lot 20, Block 4 said Del Rey Beach, said last-mentioned parallel line to be known as Line "H" for purposes of this description, distant 147.60 feet northeasterly measured along said Line "H" from its point of intersection with said southeasterly prolongation, said point of intersection to be known as Point "H" for purposes of this description; thence southeasterly in a direct line to a point in a line having a bearing of North 59° 05' 38" East, said last-mentioned line to be known as Line "I" for purposes of this description, distant 140.82 feet northeasterly measured along said Line "I" from said southeasterly prolongation, said Line "I" passes through a point to be known as Point "I" for purposes of this description, in said southeasterly prolongation distant South 29° 17' East 117.61 feet measured along said southeasterly prolongation from said Point "H"; thence southeasterly in a direct line to a point in a line parallel with and distant 55 feet southeasterly measured at right angles from said Line "I", distant 16.9 feet northeasterly measured along said last-mentioned parallel line from said southwesterly line of Lot C; said last-mentioned parallel line to be known as Line "J" for purposes of this description; thence easterly in a direct line to a point in a line parallel with and distant 13.3 feet southeasterly measured at right angles from said Line "J" distant 57 feet northeasterly measured along said last-mentioned parallel line from said last-mentioned southwesterly line, said last-mentioned point to be known as Point "J", for purposes of this description, a line extending northwesterly in a direct line from the intersection of a line parallel with and distant 11 feet southeasterly measured at right angles from said Line "J" said last-mentioned line to be known as Line "K" for purposes of this description with a line extending northwesterly at right

angles from a line parallel with and distant 12 feet southeasterly measured at right angles from said Line "J" which passes through a point in said last-mentioned parallel line distant 72 feet northeasterly measured along said last-mentioned parallel line from said last-mentioned southwesterly line said last-mentioned parallel line to be known as Line "L" for purposes of this description, passes through a point in said Line "J" distant 60.9 feet northeasterly measured along said Line "J" from said last-mentioned southwesterly line, said last-mentioned line extending northwesterly in a direct line is to be known as Line "M" for purposes of this description; thence northeasterly in a direct line from said Point "J" to a point in said Line "M" distant 5.0 feet northwesterly measured along said Line "M" from said Line "K"; thence northerly in a direct line to a point in a line parallel with and distant 1 foot northeasterly measured at right angles from said Line "M" distant 6.8 feet northwesterly measured along said last-mentioned parallel line from said Line "K"; thence southeasterly along said last-mentioned parallel line to said Line "K"; thence northeasterly along said Line "K" to a point to be known as Point "K" for purposes of this description, in a line extending northwesterly at right angles from said Line "L" which passes through a point in said Line "L" distant 99.85 feet northeasterly measured along said Line "L" from said last-mentioned southwesterly line, a line extending northeasterly from said Point "K" passes through a point in said Line "J" distant 56.15 feet southwesterly measured along said Line "J" from the most southwesterly northeasterly line of said Lot C; thence northeasterly along said last-mentioned line extending northeasterly 6.8 feet; thence southeasterly in a direct line to a point in a line parallel with and distant 1 foot southeasterly measured at right angles from said last-mentioned line extending northeasterly, distant 4.5 feet northeasterly measured along said last-mentioned line extending northeasterly from said Line "K"; thence easterly in a direct line to the intersection of said Line "K" with a line extending northwesterly at right angles from said Line "L" which passes through a point in said Line "L" distant 108 feet

northeasterly measured along said Line "L" from said southwesterly line of Lot C; thence northeasterly in a direct line to a point in said Line "J" distant 17 feet southwesterly measured along said Line "J" from said northeasterly line of Lot C; thence northerly along a direct line which passes through a point in said Line "I", distant 6 feet northeasterly measured along said line "I" from said last-mentioned northeasterly line to said last-mentioned northeasterly line; thence northwesterly along said last-mentioned northeasterly line to a point in a line extending northwesterly in a direct line from said point in Line "I" distant 6 feet northeasterly measured along said Line "I" from said last-mentioned northeasterly line, to a point in said Line "H" distant 15 feet southwesterly measured along said Line "H" from said last-mentioned northeasterly line; thence northwesterly along said last-mentioned direct line to said last-mentioned point; thence northerly along a direct line which passes through a point in said Line "G" distant 9 feet northeasterly measured along said Line "G" from said last-mentioned northeasterly line to said last-mentioned northeasterly line; thence northwesterly along said last-mentioned northeasterly line to a line extending northwesterly in a direct line from a point in said Line "A" distant 1 foot northeasterly measured along said Line "A" from said last-mentioned northeasterly line which passes through a point in the most northwesterly line of said Lot C distant 6.35 feet southwesterly measured along said last-mentioned northwesterly line from said last-mentioned northeasterly line; thence northwesterly along said last-mentioned direct line to said last-mentioned northwesterly line; thence southwesterly along said last-mentioned northwesterly line to said southwesterly line of Lot C; thence southeasterly along said last-mentioned southwesterly line to the **TRUE POINT OF BEGINNING.**

APPENDIX A-6

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

THE CITY OF LOS ANGELES a municipal corporation,	)	NO. 868 223
	)	JUDGMENT
Plaintiff,	)	AFTER TRIAL
vs.	)	BY COURT
ETHEL FRASER CARMAN-RYLES, et al.,	)	
Defendants.	)	[Department 23]
THE CITY OF LOS ANGELES, Acting by and through the State Lands Commission,	)	
Cross-Complainant,	)	
vs.	)	
RUTH JONES WRIGHT, et al.,	)	
Cross-defendants	)	

The above-entitled matter came on regularly for trial commencing on February 18, 1975, before the Honorable Samuel Greenfield, Judge Presiding, in Department 23 of the above-entitled court without a jury. Burt Pines, City Attorney, Norman L. Roberts, Assistant City Attorney, and Anthony P. Parrille, Deputy City Attorney, by Anthony P. Parrille, appeared for plaintiff and cross-defendant, THE CITY OF LOS ANGELES. Loren Miller, Jr., William A. Dorland and Jack D. Janofsky by William A. Dorland appered for defendant and cross-defendant, SOUTHERN CALIFORNIA GAS COMPANY. Hill, Farrer & Burrill, William M. Bitting and Steven W. Bacon by William M. Bitting and Steven W. Bacon

appeared for defendant and cross-defendant, SUMMA CORPORATION (formerly known as "Hughes Tool Company"). Evelle J. Younger, Attorney General, Alan V. Hager, Jerold Krieger and Russell Iungerich, Deputy Attorneys General, by Russell Iungerich, appeared for defendant and cross-complainant, the STATE OF CALIFORNIA. Pacht, Ross, Warne, Bernhard and Sears, Inc., by Henry J. Shames and Paul Hamilton, appeared for defendant and cross-defendant, VENICE PENINSULA PROPERTIES. Mitchell and Mitchell and David J. Pierce, by David J. Pierce, appeared for defendants and cross-defendant, RUTH JONES-WRIGHT, and for defendants and cross-defendants ROBERT D. BYRNE and BYRNE C. MANSON as trustees under the Will of Olive Byrne Jones, deceased.

Pursuant to stipulation of the parties and good cause appearing therefor, on April 24, 1975, trial of the matter was ordered bifurcated. Thereafter, between April 24, 1975 and May 13, 1975 the court heard the testimony and examined the proof offered by the parties pertaining to the first stage of the trial.

Following trial on the first stage of the trial and post trial proceedings, Findings of Fact and Conclusions of Law were executed by the Court on February 22, 1977, determining the issues as to the existence of easements and as to the geographical boundaries of said easements in Lot C of Del Rey Beach Subdivision only (that portion lying northwesterly of the Marina del Rey entrance channel).

Thereafter, a stipulation among all defendants, excluding SUMMA and SOUTHERN CALIFORNIA GAS COMPANY, was executed and filed with the court on August 10, 1977. Thereby those parties executing same agreed to the geographical boundaries of the State's and City's easements within Lot R of the Silver Strand Subdivision, waived trial on the issue of the geographical boundaries within said Lot R, and consented to a judgment being entered as to said boundaries, said judgment however being subject to a right to appeal therefrom.

Both the first and second stages of the bifurcated trial having been concluded, the court having heard the testimony, considered the evidence and the court having already filed its Findings of Fact and Conclusions of Law and having considered and reviewed said stipulation:

IT IS THEREFORE ADJUDGED, DETERMINED AND DECREED:

1. That the STATE OF CALIFORNIA holds in trust for the People of the State of California an easement for navigation, commerce and fisheries in, over, upon and under the waters of the Ballona Lagoon up to the line of the Mean High Tide within portions of Lot C of the Del Rey Beach Subdivision and within portions of Lot R of the Silver Strand Subdivision more particularly described in those exhibits attached hereto and made a part hereof entitled "Mean High Tide Line of that portion of the Ballona Lagoon within Lot C Del Rey Beach" and "Mean High Tide Line of that portion of the Ballona Lagoon within Lot R, Silver Strand Subdivison."

2. The public has an easement in the same portions of Lots C and R for the passage of fresh sea water from the Pacific Ocean through the Ballona Lagoon to the Venice Canals.

Said portions of Lots C and R are also subject to an easement for general purposes of water recreation.

3. The State of California, its successors and/or assigns has the right to open, dredge, construct sea walls or otherwise improve the subject property without prior exercise of the right of eminent domain or payment of compensation.

4. The right of the State of California is paramount to the right of the Southern California Gas Company, the holder of a pipeline easement within the portions of Lot C of Del Rey Beach Subdivision described in Exhibit 89.

5. The City of Los Angeles is the owner of an easement for public streets or waterways in all of the real property described and designated as Lot C of the Del Rey Beach Subdivision and as Lot R of the Silver Strand Subdivision, the easements therein were offered for recordation of the Tract Maps of said

subdivisions. Acceptance was by the sale of some of the lots abutting Lots C and R and by public use of Lots C and R.

6. Each party is ordered to bear its own costs of suit herein.

The Clerk is ordered to enter this Judgment.

DATED: October 11, 1977.

/s/ Samuel Greenfield
SAMUEL GREENFIELD
Judge of the Superior Court

[Exhibit to Judgment]

MEAN HIGH TIDE LINE OF THAT PORTION OF THE BALLONA LAGOON WITHIN LOT C, DEL REY BEACH

That portion of Lot C, Del Rey Beach, per map recorded in Book 6, page 186 of Maps, in the office of the County Recorder of Los Angeles County, bounded and described as follows:

Commencing at a point in the northwesterly line of Lot 16, Block 1, said Del Rey Beach, distant 105.38 feet northeasterly measured along said northwesterly line and its southwesterly prolongation from a line parallel with and distant 20 feet southwesterly measured at right angles from the southwesterly line of said Lot 16, said parallel line is to have a bearing of South 29° 17' 00" East for purposes of this description; thence southeasterly in a direct line to a point in a line having a bearing of North 59° 01' 38" East, said last-mentioned line to be known as Line "A" for purposes of this description, distant 108.00 feet northeasterly measured along said Line "A" from the southeasterly prolongation of said parallel line, said Line "A" passes through a point, to be known as Point "A" for purposes of this description, in said southeasterly prolongation distant South 29° 17' East 75.50 feet measured along said southeasterly prolongation from said southwesterly prolongation of the northwesterly line of Lot 16; thence southeasterly along a direct line to the TRUE POINT OF BEGINNING for purposes of this description in the southwesterly line of said Lot C, said last-mentioned direct line passes through a point in the northeasterly prolongation of a line parallel with and distant 20 feet southeasterly measured at right angles from the southeasterly line of Lot 19, said Block 1, said last-mentioned parallel line to be known as Line "B" for purposes of this description, distant 136.35 feet northeasterly measured along said Line "B" from its point of intersection with said southeasterly prolongation, having a bearing of South 29° 17' East, said point of intersection to be known as Point "B" for purposes of this description; thence southeasterly in a direct line to a point in a line having a bearing of North 59° 05' 00" East, said last-

mentioned line to be known as Line "C" for purposes of this description, distant 144.56 feet northeasterly measured along said Line "C" from the southeasterly prolongation of said parallel line having a bearing of South 29° 17′ East, said Line "C" passes through a point to be known as Point "C" for purposes of this description, in said southeasterly prolongation distant south 29° 17′ East 117.50 feet measured along said southeasterly prolongation from said Point "B"; thence southeasterly in a direct line to a point in the northeasterly prolongation of a line parallel with and distant 20 feet southeasterly measured at right angles from the southeasterly line of Lot 20, Block 2, said Del Rey Beach, said last-mentioned parallel line to be known as Line "D" for purpose of this description, distant 149.77 feet northeasterly measured along said Line "D" from its point of intersection with said southeasterly prolongation, said point of intersection to be known as Point "D" for purposes of this description; thence southeasterly in a direct line to a point in a line having a bearing of North 59° 05′ 23″ East, said last-mentioned line to be known as Line "E" for purposes of this description, distant 152.98 feet northeasterly measured along said Line "E" from said southeasterly prolongation, said Line "E" passes through a point, to be known as Point "E" for purposes of this description, in said southeasterly prolongation distant South 29° 17′ East 117.56 feet measured along said southeasterly prolongation from said Point "D"; thence southeasterly in a direct line to a point in the northeasterly prolongation of a line parallel with and distant 20 feet southeasterly measured at right angles from the southeasterly line of Lot 20, Block 3 said Del Rey Beach, said last-mentioned parallel line to be known as Line "F" for purposes of this description, distant 145.19 feet northeasterly measured along said Line "F" from its point of intersection with said southeasterly prolongation, said point of intersection to be known as Point "F" for purposes of this description; thence southeasterly in a direct line to a point in a line having a bearing of North 59° 05′ 15″ East, said last-mentioned line to be known as Line "G" for purposes of this description, distant 154.40 feet northeasterly measured along said Line "G" from

said southeasterly prolongation, said Line "G" passes through a point, to be known as Point "G" for purposes of this description, in said southeasterly prolongation distant South 29° 17' East 117.57 feet measured along said southeasterly prolongation from said Point "F"; thence southeasterly in a direct line to a point in the northeasterly prolongation of a line parallel with and distant 20 feet southeasterly measured at right angles from the southeasterly line of Lot 20, Block 4 said Del Rey Beach, said last-mentioned parallel line to be known as Line "H" for purposes of this description, distant 147.60 feet northeasterly measured along said Line "H" from its point of intersection with said southeasterly prolongation, said point of intersection to be known as Point "H" for purposes of this description; thence southeasterly in a direct line to a point in a line having a bearing of North 59° 05' 38" East, said last-mentioned line to be known as Line "I" for purposes of this description, distant 140.82 feet northeasterly measured along said Line "I" from said southeasterly prolongation, said Line "I" passes through a point to be known as Point "I" for purposes of this description, in said southeasterly prolongation distant South 29° 17' East 117.61 feet measured along said southeasterly prolongation from said Point "H"; thence southeasterly in a direct line to a point in a line parallel with and distant 55 feet southeasterly measured at right angles from said Line "I", distant 16.9 feet northeasterly measured along said last-mentioned parallel line from said southwesterly line of Lot C; said last-mentioned parallel line to be known as Line "J" for purposes of this description; thence easterly in a direct line to a point in a line parallel with and distant 13.3 feet southeasterly measured at right angles from said Line "J" distant 57 feet northeasterly measured along said last-mentioned parallel line from said last-mentioned southwesterly line, said last-mentioned point to be known as Point "J", for purposes of this description, a line extending northwesterly in a direct line from the intersection of a line parallel with and distant 11 feet southeasterly measured at right angles from said Line "J" said last-mentioned line to be known as Line "K" for purposes of this description with a line extending northwesterly at right

angles from a line parallel with and distant 12 feet southeasterly measured at right angles from said Line "J" which passes through a point in said last-mentioned parallel line distant 72 feet northeasterly measured along said last-mentioned parallel line from said last-mentioned southwesterly line said last-mentioned parallel line to be known as Line "L" for purposes of this description, passes through a point in said Line "J" distant 60.9 feet northeasterly measured along said Line "J" from said last-mentioned southwesterly line, said last-mentioned line extending northwesterly in a direct line is to be known as Line "M" for purposes of this description; thence northeasterly in a direct line from said Point "J" to a point in said Line "M" distant 5.0 feet northwesterly measured along said Line "M" from said Line "K"; thence northerly in a direct line to a point in a line parallel with and distant 1 foot northeasterly measured at right angles from said Line "M" distant 6.8 feet northwesterly measured along said last-mentioned parallel line from said Line "K"; thence southeasterly along said last-mentioned parallel line to said Line "K"; thence northeasterly along said Line "K" to a point to be known as Point "K" for purposes of this description, in a line extending northwesterly at right angles from said Line "L" which passes through a point in said Line "L" distant 99.85 feet northeasterly measured along said Line "L" from said last-mentioned southwesterly line, a line extending northeasterly from said Point "K" passes through a point in said Line "J" distant 56.15 feet southwesterly measured along said Line "J" from the most southwesterly northeasterly line of said Lot C; thence northeasterly along said last-mentioned line extending northeasterly 6.8 feet; thence southeasterly in a direct line to a point in a line parallel with and distant 1 foot southeasterly measured at right angles from said last-mentioned line extending northeasterly, distant 4.5 feet northeasterly measured along said last-mentioned line extending northeasterly from said Line "K"; thence easterly in a direct line to the intersection of said Line "K" with a line extending northwesterly at right angles from said Line "L" which passes through a point in said Line "L" distant 108 feet

northeasterly measured along said Line "L" from said southwesterly line of Lot C; thence northeasterly in a direct line to a point in said Line "J" distant 17 feet southwesterly measured along said Line "J" from said northeasterly line of Lot C; thence northerly along a direct line which passes through a point in said Line "I", distant 6 feet northeasterly measured along said line "I" from said last-mentioned northeasterly line to said last-mentioned northeasterly line; thence northwesterly along said last-mentioned northeasterly line to a point in a line extending northwesterly in a direct line from said point in Line "I" distant 6 feet northeasterly measured along said Line "I" from said last-mentioned northeasterly line, to a point in said Line "H" distant 15 feet southwesterly measured along said Line "H" from said last-mentioned northeasterly line; thence northwesterly along said last-mentioned direct line to said last-mentioned point; thence northerly along a direct line which passes through a point in said Line "G" distant 9 feet northeasterly measured along said Line "G" from said last-mentioned northeasterly line to said last-mentioned northeasterly line; thence northwesterly along said last-mentioned northeasterly line to a line extending northwesterly in a direct line from a point in said Line "A" distant 1 foot northeasterly measured along said Line "A" from said last-mentioned northeasterly line which passes through a point in the most northwesterly line of said Lot C distant 6.35 feet southwesterly measured along said last-mentioned northwesterly line from said last-mentioned northeasterly line; thence northwesterly along said last-mentioned direct line to said last-mentioned northwesterly line; thence southwesterly along said last-mentioned northwesterly line to said southwesterly line of Lot C; thence southeasterly along said last-mentioned southwesterly line to the **TRUE POINT OF BEGINNING.**

[Exhibit to Judgment]

MEAN HIGH TIDE LINE OF THAT PORTION OF THE BALLONA LAGOON WITHIN LOT R, SILVER STRAND

PARCEL 1

That portion of Lot R, Silver Strand per map recorded in Book 7, pages 86 and 87, of Maps, in the office of the County Recorder of Los Angeles County, bounded and described as follows:

Beginning at a point in that certain course in the southeasterly line of said Lot R shown as having a bearing and length of North 62° 07' East 149.02 feet on said map distant 26 feet northeasterly measured along said course from the most southerly corner of said lot; thence northwesterly in a direct line to the intersection of the southwesterly line of said lot with a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot Q said tract; thence northwesterly in a direct line to a point in the southwesterly prolongation of a line parallel with and distant 7.5 feet northwesterly measured at right angles from the northwesterly line of Lot 6, Block 17 said Silver Strand distant 9 feet northeasterly measured along said southwesterly prolongation from said southwesterly line said southwesterly prolongation is to be hereainafter referred to as Line "A"; thence northwesterly in a direct line to a point in a line which extends southwesterly from the intersection of a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot 1 said Block 17, with a line parallel with and distant 5 feet southwesterly measured at right angles from the southwesterly line of said Lot 1 and which passes through the intersection of said southwesterly line of Lot R with a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot P said tract distant 5 feet northeasterly measured along said line extending southwesterly from said southwesterly line of Lot R, said line extending southwesterly is to be hereinafter referred to as Line B; thence northwesterly along a direct line which passes

through a point in the southwesterly prolongation of a line parallel with and distant 7.5 feet northwesterly measured at right angles from the northwesterly line of Lot 6, Block 16 said tract distant 6 feet southwesterly measured along said last-mentioned southwesterly prolongation from said southwesterly line of Lot R to said southwesterly line of Lot R said last-mentioned southwesterly prolongation is to be hereinafter referred to as Line "C"; thence northwesterly along said southwesterly line of Lot R to a point distant 675.14 feet northwesterly measured along said southwesterly line of Lot R from said most southerly corner; thence northeasterly at right angles from said southwesterly line of Lot R to the northeasterly line of Lot R; thence southeasterly along said northeasterly line of Lot R to a line which extends southeasterly from a point in a line parallel with and distant 5 feet southwesterly measured at right angles from the southwesterly line of Lot 1 said Block 16 distant 1 foot northerly measured along said last-mentioned parallel line from its intersection with a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of said last-mentioned Lot 1 and which passes through the intersection of a line parallel with and distant 3 feet northwesterly measured at right angles from Line "C" with a line parallel with and distant 6 feet southwesterly measured at right angles from said northeasterly line of Lot R; thence southeasterly along said line extending southeasterly to said last-mentioned intersection; thence southeasterly in a direct line to the intersection of a line parallel with and distant 25 feet southeasterly measured at right angles from line "C" with a line parallel with and distant 3 feet southwesterly measured at right angles from said northeasterly line of Lot R; thence southeasterly in a direct line to a point in Line "B" distant 7 feet southwesterly measured along Line "B" from said northeasterly line of Lot R; thence southeasterly along a direct line which passes through a point in Line "A" distant 5 feet northeasterly measured along Line "A" from said northeasterly line of Lot R to said northeasterly line of Lot R; thence southeasterly along said northeasterly line of Lot R to the northeasterly terminus of said course having a bearing and

length of North 62° 07' East 149.02 feet; thence southwesterly along said last-mentioned course to the point of beginning.

PARCEL 2

That portion of Lot R Silver Strand per map recorded in Book 7, pages 86 and 87, of Maps, in the office of the County Recorder of Los Angeles County, bounded and described as follows:

Beginning at a point in the southwesterly line of said Lot R distant 675.14 feet northwesterly measured along said southwesterly line from the most southerly corner of said lot; thence northwesterly along said southwesterly line to a line which extends northwesterly from a point in a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot N said tract distant 2 feet southwesterly measured along said parallel line from said southwesterly line and which passes through a point in the southwesterly prolongation of a line parallel with and distant 7.5 feet northwesterly measured at right angles from the northwesterly line of Lot 6, Block 14 said tract distant 10 feet northeasterly measured along said southwesterly prolongation from said southwesterly line; thence northwesterly along said line extending northwesterly to said last-mentioned point; thence northwesterly in a direct line to a point in a line extending southwesterly from the intersection of a line parallel with and distant 5 feet southwesterly measured at right angles from the southwesterly line of Lot 1 said Block 14 with a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of said Lot 1 and which passes through the intersection of a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot M said tract with said southwesterly line of Lot R distant 29 feet northeasterly measured along said last-mentioned line extending southwesterly from said southwesterly line of Lot R; thence northwesterly in a direct line to a point in the southwesterly prolongation of a line parallel with and distant 7.5 northwesterly measured at right angles from the northwesterly line of Lot 6 Block 13 said tract distant 40

feet northeasterly measured along said last-mentioned prolongation from said southwesterly line of Lot R; thence northwesterly to a point in the northeasterly prolongation of a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot L said tract distant 20 feet northeasterly measured along said northeasterly prolongation from said southwesterly line of Lot R; thence northwesterly in a direct line to a point in the southwesterly prolongation of a line parallel with and distant 40.9 feet southeasterly measured at right angles from the northwesterly line of Lot 6 Block 12 said tract distant 35 feet northeasterly measured along said last-mentioned southwesterly prolongation from said southwesterly line of Lot R said last-mentioned southwesterly prolongation is to be hereinafter referrred to as Line "E"; thence northwesterly along a direct line which passes through a point in the southwesterly prolongation of a line parallel with and distant 7.5 feet northwesterly measured at right angles from said last-mentioned northwesterly line distant 27 feet northeasterly measured along said last-mentioned southwesterly prolongation from said southwesterly line of Lot R, said last-mentioned line extending southwesterly is to be hereinafter referrred to as Line "F", to a line extending northeasterly at right angles from said last-mentioned southwesterly line from a point distant 1328.51 feet northwesterly measured along said last-mentioned southwesterly line from said most southerly corner; thence northeasterly along said line extending northeasterly to a line extending southeasterly from a point in Line "F" distant 5 feet southwesterly measured along said Line "F" from said northeasterly line and which passes through a point in Line "E" distant 5 feet southwesterly measured along said Line "E" from said northeasterly line; thence southeasterly along said last-mentioned line extending southeasterly to said last-mentioned point; thence distant 2 feet northeasterly measured along said Line "D" from said northeasterly line to said northeasterly line; thence southeasterly along said northeasterly line to a line extending northeasterly at right angles from said southwesterly line and which passes through the

point of beginning; thence southwesterly along said last-mentioned line extending northeasterly to the point of beginning.

PARCEL 3

That portion of Lot R, Silver Strand per map recorded in Book 7, pages 86 and 87, of Maps, in the office of the County Recorder of Los Angeles County, bounded and described as follows:

Beginning at the intersection of a line extending northeasterly from a point in the southwesterly line of said Lot R distant 132.51 feet northwesterly measured along said southwesterly line from the most southerly corner of said lot with a line which extends northwesterly from a point in the southwesterly prolongation of a line parallel with and distant 40.9 feet southeasterly measured at right angles from the northwesterly line of Lot 6, Block 12 said tract distant 35 feet northeasterly measured along said southeasterly prolongation from said southwesterly line, said southwesterly prolongation is to be hereinafter referred to as Line "E" and which passes through a point in the southwesterly prolongation of a line parallel with and distant 7.5 feet northwesterly measured at right angles from said northwesterly line distant 27 feet northeasterly measured along southwesterly prolongation is to be hereinafter referred to as Line "F"; thence northwesterly along said line extending northwesterly to said Line "F"; thence northwesterly in a direct line to a point in a line which extends northeasterly from the intersection of a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot K said tract with said southwesterly line and which passes through the intersection of a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot 1 said block with a line parallel with and distant 5 feet southwesterly measured at right angles from the southwesterly line of said Lot 1, distant 14 feet northeasterly measured along said line extending northeasterly from said southwesterly line of Lot R, said line extending northeasterly is to be hereinafter referred to as Line "G"; thence in a direct line to a point in the southwesterly prolongation of a line

parallel with and distant 7.5 feet northwesterly measured at right angles from the northwesterly line of Lot 6, Block 11 said tract distant 29 feet northeasterly measured along said last-mentioned southwesterly prolongation from said last-mentioned southwesterly line, said last-mentioned southwesterly prolongation is to be hereinafter referred to as Line "H"; thence northwesterly in a direct line to a point in a line extending northeasterly from the intersection of a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot J, said tract with said last-mentioned southwesterly line, said last-mentioned prolongation is to be hereinafter referred to as Point "I" and which passes through the intersection of a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot 1, said Block 11 with a line parallel with and distant 5 feet southwesterly measured at right angles from the southwesterly line of said last-mentioned Lot 1, distant 21 feet northeasterly measured along said last-mentioned line extending northeasterly from said southeasterly line of Lot R, said last-mentioned line extending northeasterly is to be hereinafter referred to as Line "I"; thence northwesterly in a direct line to a point in a line extending northeasterly at right angles from said last-mentioned southwesterly line from a point distant 56.02 feet northwesterly measured along said last-mentioned southwesterly line from point "I" distant 26 feet northeasterly measured along said last-mentioned line extending northeasterly from said last-mentioned southwesterly line; thence northeasterly along said last-mentioned line extending northeasterly 21 feet; thence parallel with said last-mentioned southwesterly line 72 feet; thence parallel with said last-mentioned line extending northeasterly 34 feet; thence parallel with said last-mentioned line extending northeasterly 34 feet; thence parallel with said last-mentioned southwesterly line 72 feet; thence northwesterly in a direct line to a point in the northeasterly prolongation of a line parallel with and distant 29 feet northwesterly measured at right angles from the northwesterly line of Lot "I", said tract distant 15 feet northeasterly measured

along said last-mentioned prolongation from said last-mentioned southwesterly line; said last-mentioned northeasterly prolongation is to be hereinafter referred to as Line "J"; thence northwesterly in a direct line to a direct line to a point in the southwesterly prolongation of a line parallel with and distant 7.5 feet northwesterly measured at right angles from the northwesterly line of Lot 6, Block 9 said tract distant 9 feet northeasterly measured along said last-mentioned southwesterly prolongation from said last-mentioned southwesterly line, said last-mentioned southwesterly prolongation is to be hereinafter referred to as Line "K"; thence northwesterly in a direct line to a point in the northeasterly prolongation of a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot H, said tract distant 13 feet northeasterly measured along said last-mentioned northeasterly prolongation from said last-mentioned southwesterly line, said last-mentioned northeasterly prolongation is to be hereinafter referred to as Line "L"; thence northwesterly in a direct line to a point in the southwesterly prolongation of a radial line which passes through the southerly terminus of that certain curve in the northeasterly line of said Lot P shown on the map of said tract as having a radius of 202.18 feet, distant 24 feet northeasterly measured along said last-mentioned southwesterly prolongation from said last-mentioned southwesterly line, said last-mentioned southwesterly prolongation is to be hereinafter referred to as Line "M"; thence northeasterly along Line "M" to a point distant 5 feet southwesterly measured along Line "M" from the northeasterly line of said Lot R; thence southeasterly in a direct line to a point in Line "L", distant 12 feet southwesterly measured along Line "L" from said northeasterly line; thence southeasterly in a direct line to a point in Line "K" distant 7 feet southwesterly measured along Line "K" from said northeasterly line; thence southeasterly in a direct line to a point in Line "J" distant 6 feet southwesterly measured along Line "J" from said northeasterly line; thence southeasterly in a direct line to a point in the southwesterly prolongation of a line parallel with and distant 7.5 feet northwesterly measured at right angles from the northwesterly line of Lot 6, Block 10 said

tract distant 2 feet southwesterly measured along said last-mentioned southwesterly prolongation from said northeasterly line; thence southeasterly in a direct line to a point in Line "I" distant 3 feet southwesterly measured along Line "I" from said notheasterly line; thence southeasterly in a direct line to a point in Line "H", distant 1 foot southwesterly measured along Line "H" from said notheasterly line; thence southeasterly in a direct line to a point in Line "G" distant 4 feet southwesterly measured along Line "G" from said northeasterly line; thence southeasterly in a direct line to a point in Line "F", distant 5 feet southwesterly measured along Line "F" from said northeasterly line; thence southeasterly along a direct line which passes through a point in Line "E", distant 5 feet southwesterly measured along Line "E" from said northeasterly line to said line extending northeasterly at right angles from said last-mentioned southwesterly line distant 1328.51 feet northwesterly measured along said last-mentioned southwesterly line from said most southerly corner; thence southwesterly along said last-mentioned line extending northeasterly to the point of beginning.

ALSO that portion of said Lot R lying southeasterly of a line extending northeasterly from said southwesterly line of Lot R, distant 2378.35 feet northwesterly measured along said southwesterly line from said most southerly corner included within a parcel of land bounded and described as follows:

Commencing at the southerly terminus of that certain curve in the southwesterly, westerly and northwesterly lines of said Lot R shown as having a radius of 339.58 feet on said map; thence northwesterly along said curve through a central angle of 9° 00′ 00″; thence northeasterly along a radial line of said curve 93 feet to the TRUE POINT OF BEGINNING; thence in a direct line to a point in a line parallel with and distant 8 feet southeasterly measured at right angles from said southeasterly radial line distant 97 feet northeasterly measured along a direct line extending northeasterly from the southwesterly terminus of said radial line; thence southeasterly in a direct line to point in the northeasterly prolongation of a line parallel with and distant 20 feet northwesterly measured at right angles from the

northwesterly line of Lot G, said tract distant 73 feet northeasterly measured along said last-mentioned northeasterly prolongation from the southwesterly line of said Lot R; thence southerly along the southeasterly prolongation of said last-mentioned direct line 46 feet; thence southwesterly along a line intersecting a line extending northeasterly from said southwesterly line of Lot R from a point distant 10 feet southeasterly measured along said southwesterly line of Lot R from the most northerly corner of said Lot G at a point distant 7 feet northeasterly measured along said last-mentioned line extending northeasterly from said southwesterly line of Lot R to a point in a line parallel with and distant 45 feet northerly measured at right angles from said southwesterly line of Lot R; thence southeasterly in a direct line to said point in Line M, distant 24 feet northeasterly measured along said Line "M" from said last-mentioned southwesterly line; thence northeasterly along Line "M" to said point distant 5 feet southwesterly measured along Line "M" from said northeasterly line; thence northwesterly along a direct line which passes through a point in curve concave easterly having a radius of 197.18 and being concentric with said curve having a radius of 202.18, distant 12 feet southeasterly measured along said curve from its intersection with a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot 1, Block 8 said tract to said curve having a radius of 202.18 feet; thence northeasterly along said last-mentioned curve to said last-mentioned radial line; thence southwesterly along said last-mentioned radial line to the TRUE POINT OF BEGINNING.

PARCEL 4

That portion of Lot R Silver Strand per map recorded in Book 7, pages 86 and 87, of Maps, in the office of the County Recorder of Los Angeles County, bounded and described as follows:

Commencing at the southerly terminus of that certain curve in the southwesterly, westerly and northwesterly lines of said Lot R shown as having a radius of 339.58 feet on said map; thence northwesterly along said curve through a central angle

of 9° 00′ 00″; thence northeasterly along a radial line of said curve 93 feet to the TRUE POINT OF BEGINNING; thence in a direct line to a point in a line parallel with and distant 8 feet southeasterly measured at right angles from said radial line distant 97 feet northeasterly measured along a direct line extending northeasterly from the southwesterly terminus of said radial line; thence southeasterly in a direct line to a point in the northeasterly prolongation of a line parallel with and distant 20 feet northwesterly measured at right angles from the northwesterly line of Lot G said tract distant 73 feet northeasterly measured along said last-mentioned northeasterly prolongation from the southwesterly line of said Lot R; thence southerly the southeasterly prolongation of said last-mentioned direct line 46 feet; thence southwesterly along a line intersecting a line extending northeasterly from said southwesterly line of Lot R from a point distant 10 feet southeasterly measured along said southwesterly line of Lot R from the most northerly corner of said Lot G at a point distant 7 feet northeasterly measured along said last-mentioned line extending northeasterly from said southwesterly line of Lot R to a point in a line parallel with and distant 45 feet northeasterly measured at right angles from said southerwesterly line of Lot R southeasterly along a direct line which passes through a point in the southwesterly prolongation of a radial line of that certain curve in the northeasterly line of said Lot R shown as having a 202.18 feet on said map which passes through the southerly terminus of said last-mentioned curve distant 24 feet northeasterly measured along said southwesterly prolongation from said southwesterly line of Lot R to a line extending northeasterly at right angles from a point in said last-mentioned southwesterly line distant 2378.35 feet northwesterly measured along said last-mentioned southwesterly line from the most southerly corner of said Lot R; said line extending northeasterly is to having a bearing of South 56° 29′ West for purposes of this description; thence northeasterly along said last-mentioned line extending northeasterly to said curve having a radius of 202.18 feet; thence northerly along said curve having a radius of

202.18 feet to a point in a line extending northeasterly from a point in a radial line of said last-mentioned curve having a bearing of North 87° 31' West distant 5 feet westerly measured along said radial line from its intersection with a curve concave easterly having a radius of 197.18 feet and being concentric with said curve having a radius of 202.18 feet and which passes through a point in a radial line of said last-mentioned curve having a bearing of North 60° 31' West distant 6 feet northwesterly measured along said last-mentioned radial line from said curve having a radius of 197.18 feet; thence northeasterly along said last-mentioned line extending northeasterly to said point distant 6 feet northwesterly; thence northeasterly along a direct line which passes through a point in a radial of said curve having a radius of 339.58 feet which passes through its northerly terminus distant 8 feet northwesterly measured along said last-mentioned radial line from said curve having a radius of 197.18 feet to a radial line of said curve having a radius of 339.58 feet which passes through a point in said last-mentioned curve distant 335.44 feet southwesterly measured along the northwesterly line of said Lot R from its most northerly corner; thence northwesterly along said last-mentioned radial line to a point in a line extending southwesterly from a point in a radial line of said last-mentioned curve having a bearing of North 42° 31' West distant 1 foot southeasterly measured along said last-mentioned radial line from said last-mentioned curve and which passes through a point in a radial line of said last-mentioned curve having a bearing of North 51° 31' West distant 14 feet southeasterly measured along said last-mentioned radial line from said last-mentioned curve; thence southwesterly along said last-mentioned line extending southwesterly to said last-mentioned radial line; thence southerly in a direct line to a point in said radial line having a bearing of North 60° 31' West distant 23.5 feet southeasterly measured along said last-mentioned radial line from said last-mentioned curve; thence southerly in a direct line to a point in a radial line of said last-mentioned curve having a bearing of North 69° 31' West distant 26 feet easterly measured along said last-mentioned radial line from said last-mentioned curve; thence southeasterly in a direct

line to a point in a radial line of said last-mentioned curve having a bearing of North 78° 31' West distant 45 feet easterly measured along said last-mentioned radial line from said last-mentioned curve; thence southeasterly in a direct line to a point in said radial line having a bearing of North 87° 31' West distant 72 feet easterly measured along said last-mentioned radial line from said last-mentioned curve; thence southeasterly in a direct line to a point in a radial line of said curve having a bearing of South 83° 29' West distant 100 feet easterly measured along said last-mentioned radial line from said last-mentioned curve; thence southeasterly in a direct line to a point in a radial line of said curve having a bearing of South 74° 29' West distant 107 feet easterly measured along said last-mentioned radial line from said last-mentioned curve; thence in a direct line to the TRUE POINT OF BEGINNING.

EXCEPTING therefrom that portion bounded and described as follows:

Beginning at a point in said radial line having a bearing of North 69° 31' West distant 93 feet easterly measured along said last-mentioned radial line from said last-mentioned curve; thence northwesterly in a direct line to point in a line parallel with and distant 9 feet northerly measured at right angles from said last-mentioned radial line distant 10 feet westerly measured along said last-mentioned parallel line from a line extending northeasterly at right angles from said last-mentioned radial line and passes through the point of beginning; thence northeasterly in a direct line to a point in said last-mentioned line extending northeasterly distant 18 feet northwesterly measured along said last-mentioned line extending northeasterly from said last-mentioned radial line; thence southeasterly in a direct line to a point in said last-mentioned parallel line distant 10 feet easterly measured along said last-mentioned parallel line from said last-mentioned line extending northeasterly; thence southerly in a direct line to a point in said last-mentioned radial line distant 11 feet easterly measured along said last-mentioned radial line from the point of beginning; thence westerly along said last-mentioned radial line to the point of beginning.

PARCEL 5

That portion of Lot R, Silver Strand per map recorded in Book 7, pages 86 and 87, of Maps, in the office of the County Recorder of Los Angeles County, bounded and described as follows:

Commencing at the southwesterly terminus of that certain course in the northwesterly line of said Lot R shown as having a bearing and length of North 56° 29′ East 230.42 feet on said map; thence southwesterly along that certain curve in said northwesterly line shown as having a radius of 339.58 feet to a radial line of said curve which passes through a point in said curve distant 335.44 feet southwesterly measured along said northwesterly line from the most northerly corner of said lot; thence southeasterly along said radial line to the TRUE POINT OF BEGINNING in a line extending northerly from a point in a radial line of said curve having a bearing of North 51° 31′ North distant 14 feet southeasterly measured along said last-mentioned radial line from said curve and which passes through a point in a radial line of said curve having a bearing of North 42° 31′ West distant 1 foot southeasterly measured along said last-mentioned radial line from said curve; thence northerly along said line extending northerly to said last-mentioned radial line; thence northeasterly in a direct line to a point in a radial line of said curve which passes through its northerly terminus distant 0.5 feet southeasterly measured along said last-mentioned radial line from said curve; thence northeasterly along a direct line which passes through a point in the southwesterly line of Lot B said tract distant 3 feet northwesterly measured along said southwesterly line from said northwesterly line to said northwesterly line; thence northeasterly along said northwesterly line to a point distant 111 feet southwesterly measured along said northwesterly line from the most northerly corner of said lot; thence southeasterly in a direct line to a point in the southeasterly prolongation of the northeasterly line of said Lot B distant 15 feet southeasterly measured along said southeasterly prolongation from said northwesterly line, said southeasterly prolongation is to be hereinafter referred to as Line "N"; thence northeasterly in a

direct line to a point in a line extending southeasterly at right angles from said northwesterly line from a point distant 57 feet northeasterly measured along said northwesterly line from the most easterly corner of said Lot B distant 28 feet southeasterly measured along said last-mentioned line extending southeasterly from said northwesterly line, said line extending southeasterly is to be hereinafter referred to as Line "O"; thence northerly along a direct line which passes through a point in the northeasterly prolongation of said northwesterly line distant 2 feet northwesterly measured along said last-mentioned northeasterly prolongation from said most northerly corner to the northeasterly line of said Lot R; thence southeasterly along said northeasterly line to the intersection of a line extending southwesterly from a point in a line extending southeasterly from said northeasterly prolongation from a point distant 37 feet northwesterly measured along said northwesterly prolongation from said most northerly corner with a line parallel with and distant 182 feet southeasterly measured at right angles from said northwesterly line and which passes through a point in Line "O" distant 10 feet northwesterly measured along Line "O" from that certain course in the northeasterly line of said Lot R shown as having a bearing and length of North 52° 58' East 251.28 feet on said map; thence southwesterly along said last-mentioned line extending southwesterly to said last-mentioned point in Line "O"; thence southwesterly in a direct line to a point in said Line "N" distant 8 feet northwesterly measured along Line "N" from a line parallel with and distant 5 feet southeasterly measured at right angles from said course having a bearing and length of North 52° 58' East 251.28 feet; thence southwesterly in a direct line to a point in the southeasterly prolongation of the southwesterly line of said Lot B distant 7 feet northwesterly measured along said last-mentioned southeasterly prolongation from said course having a bearing and length of North 52° 58' East 251.28 feet; thence southwesterly in a direct line to a point in said radial line of said curve which passes through its northerly terminus distant 8 feet northwesterly measured along said last-mentioned radial line from a curve concave westerly having a radius of 197.18 feet and being

concentric with that certain curve in said northeasterly line of said Lot R shown as having a radius of 202.18 feet; thence southwesterly along a direct line which passes through a point in a radial line of said curve having a radius of 339.58 feet which bears North 60° 31' West distant 6 feet westerly measured along said last-mentioned radial line from said curve having a radius of 197.18 feet to said radial line of said curve having a radius of 339.58 feet which passes through a point in said last-mentioned curve distant 339.58 feet southwesterly measured along said northwesterly line of Lot R from said most northerly corner; thence northwesterly along said last-mentioned radial line to the TRUE POINT OF BEGINNING.

APPENDIX B-1

TREATY OF PEACE, FRIENDSHIP, LIMITS, AND SETTLEMENT WITH THE REPUBLIC OF MEXICO

In the name of Almighty God:

The United States of America and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure the concord, harmony, and mutual confidence wherein the two people should live, as good neighbors, have for that purpose appointed their respective plenipotentiaries — that is to say, the President of the United States has appointed Nicholas P. Trist, a citizen of the United States, and the President of the Mexican republic has appointed Don Luis Gonzaga Cuevas, Don Bernardo Couto, and Don Miguel Atristain, citizens of the said republic, who, after a reciprocal communication of their respective full powers, have, under the protection of Almighty God, the author of peace, arrange, agreed upon, and signed the following

Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Mexican Republic.

ARTICLE I.

There shall be firm and universal peace between the United States of America and the Mexican republic, and between their respective countries, territories, cities, towns, and people, without exception of places or persons.

ARTICLE II.

Immediately upon the signature of this treaty, a convention shall be entered into between a commissioner or commissioners appointed by the General-in-chief of the forces of the United States, and such as may be appointed by the Mexican government, to the end that a provisional suspension of hostilities shall take place, and that, in the places occupied by the said

forces, constitutional order may be reestablished, as regards the political, administrative, and judicial branches, so far as this shall be permitted by the circumstances of military occupation.

ARTICLE III.

Immediately upon the ratification of the present treaty by the government of the United States, orders shall be transmitted to the commanders of their land and naval forces, requiring the latter (provided this treaty shall then have been ratified by the government of the Mexican republic, and the ratifications exchanged) immediately to desist from blockading any Mexican ports; and requiring the former (under the same condition) to commence, at the earliest moment practicable, withdrawing all troops of the United States then in the interior of the Mexican republic, to points that shall be selected by common agreement, at a distance from the seaports not exceeding thirty leagues; and such evacuation of the interior of the republic shall be completed with the least possible delay; the Mexican government hereby binding itself to afford every facility in its power for rendering the same convenient to the troops, on their march and in their new positions, and for promoting a good understanding between them and the inhabitants. In like manner orders shall be despatched to the persons in charge of the custom-houses at all ports occupied by the forces of the United States, requiring them (under the same condition) immediately to deliver possession of the same to the persons authorized by the Mexican government to receive it, together with all bonds and evidences of debt for duties on importations and on exportations, not yet fallen due. Moreover, a faithful and exact account shall be made out, showing the entire amount of all duties on imports and on exports, collected at such custom-houses, or elsewhere in Mexico, by authority of the United States, from and after the day of the ratification of this treaty by the government of the Mexican republic; and also an account of the cost of collection; and such entire amount, deducting only the cost of collection, shall be delivered to the Mexican government, at the city of Mexico, within three months after the exchange of ratifications.

The evacuation of the capital of the Mexican republic by the troops of the United States, in virtue of the above stipulation, shall be completed in one month after the orders there stipulated for shall have been received by the commander of said troops, or sooner if possible.

ARTICLE IV.

Immediately after the exchange of ratifications of the present treaty, all castles, forts, territories, places, and possessions, which have been taken or occupied by the forces of the United States during the present war, within the limits of the Mexican republic, as about to be established by the following article, shall be definitively restored to the said republic, together with all the artillery, arms, apparatus of war, munitions, and other public property, which were in the said castles and forts when captured, and which shall remain there at the time when this treaty shall be duly ratified by the government of the Mexican republic. To this end, immediately upon the signature of this treaty, orders shall be despatched to the American officers commanding such castles and forts, securing against the removal or destruction of any such artillery, arms, apparatus of war, munitions, or other public property. The city of Mexico, within the inner line of intrenchments surrounding the said city, is comprehended in the above stipulations, as regards the restoration of artillery, apparatus of war, &c.

The final evacuation of the territory of the Mexican republic, by the forces of the United States, shall be completed in three months from the said exchange of ratifications, or sooner if possible: the Mexican government hereby engaging, as in the foregoing article, to use all means in its power for facilitating such evacuation, and rendering it convenient to the troops, and for promoting a good understanding between them and the inhabitants.

If, however, the ratification of this treaty by both parties should not take place in time to allow the embarcation of the troops of the United States to be completed before the commencement of the sickly season, at the Mexican ports on the Gulf of Mexico, in such case a friendly arrangement shall be

entered into between the General-in-chief of the said troops and the Mexican government, whereby healthy and otherwise suitable places, at a distance from the ports not exceeding thirty leagues, shall be designated for the residence of such troops as may not yet have embarked, until the return of the healthy season. And the space of time here referred to as comprehending the sickly season, shall be understood to extend from this first day of May to the first day of November.

All prisoners of war taken on either side, on land or on sea, shall be restored as soon as practicable after the exchange of ratifications of this treaty. It is also agreed that if any Mexicans should now be held as captives by any savage tribe within the limits of the United States, as about to be established by the following article, the government of the said United States will exact the release of such captives, and cause them to be restored to their country.

ARTICLE V.

The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town call *Paso)* to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled *"Map of*

the United Mexican States, as organized and defined by various acts of the Congress of said republic, and constructed according to the best authorities. Revised edition. Published at New York, in 1847 *by J. Disturnell."* Of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned plenipotentiaries. And in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean distant one marine league due south of the southernmost point of the port of San Diego, according to the plan of said port made in the year 1782 by Don Juan Pantoja, second sailing-master of the Spanish fleet, and published at Madrid in the year 1802, in the Atlas to the voyage of the schooners *Sutil* and *Mexicana*, of which plan a copy is hereunto added, signed and sealed by the respective plenipotentiaries.

In order to designate the boundary line with due precision, upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both republics, as described in the present article, the two governments shall each appoint a commissioner and a surveyor, who, before the expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the port of San Diego, and proceed to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result agreed upon by them shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.

The boundary line established by this article shall be religiously respected by each of the two republics, and no change shall ever be made therein, except by the express and free consent of both nations, lawfully given by the general government of each, in conformity with its own constitution.

ARTICLE VI.

The vessels and citizens of the United States shall, in all time, have a free and uninterrupted passage by the Gulf of California, and by the River Colorado below its confluence with the Gila, to and from their possessions situated north of the boundary line defined in the preceding article; it being understood that this passage is to be by navigating the Gulf of California and the River Colorado, and not by land, without the express consent of the Mexican government.

If, by the examinations which may be made, it should be ascertained to be practicable and advantageous to construct a road, canal, or railway, which should in whole or in part run upon the River Gila, or upon its right or its left bank, within the space of one marine league from either margin of the river, the governments of both republics will form an agreement regarding its construction, in order that it may serve equally for the use and advantage of both countries.

ARTICLE VII.

The River Gila, and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the fifth article, divided in the middle between the two republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels, or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both governments.

The stipulations, contained in the present article shall not impair the territorial rights of either republic within its established limits.

ARTICLE VIII.

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

ARTICLE IX.

Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of

the United States, according to the principles of the constitution; and in in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE X.

[Stricken out]

ARTICLE XI.

Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall be exacted — all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens.

It shall not be lawful, under any pretext whatever, for any inhabitant of the United States to purchase or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two republics, nor to purchase or acquire horses, mules, cattle, or property of any kind, stolen within Mexican territory by such Indians.

And in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the government of the latter engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them and return them to their country, or deliver

them to the agent or representative of the Mexican government. The Mexican authorities will, as far as practicable, give to the government of the United States notice of such captures; and its agent shall pay the expenses incurred in the maintenance and transmission of the rescued captives; who, in the meantime, shall be treated with the utmost hospitality by the American authorities at the place where they may be. But if the government of the United States, before receiving such notice from Mexico, should obtain intelligence, through any other channel, of the existence of Mexican captives within its territory, it will proceed forthwith to effect their release and delivery to the Mexican agent, as above stipulated.

For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress demanded by their true spirit and intent, the government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said government when providing for the removal of the Indians from any portion of the said territories, or for its being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

ARTICLE XII.

In consideration of the extension acquired by the boundaries of the United States, as defined in the fifth article of the present treaty, the government of the United States engages to pay to that of the Mexican republic the sum of fifteen millions of dollars.

Immediately after this treaty shall have been duly ratified by the government of the Mexican republic, the sum of three millions of dollars shall be paid to the said government by that of the United States, at the city of Mexico, in the gold or silver coin of Mexico. The remaining twelve millions of dollars shall be paid at the same place, and in the same coin, in annual

instalments of three millions of dollars each, together with interest on the same at the rate of six per centum per annum. This interest shall begin to run upon the whole sum of twelve millions from the day of the ratification of the present treaty by the Mexican government, and the first of the instalments shall be paid at the expiration of one year from the same day. Together with each annual instalment, as it falls due, the whole interest accruing on such instalment from the beginning shall also be paid.

ARTICLE XIII.

The United States engage, moreover, to assume and pay to the claimants all the amounts now due them, and those hereafter to become due, by reason of the claims already liquidated and decided against the Mexican republic, under the conventions between the two republics severally concluded on the eleventh day of April, eighteen hundred and thirty-nine, and on the thirtieth day of January, eighteen hundred and forty-three; so that the Mexican republic shall be absolutely exempt, for the future, from all expense whatever on account of the said claims.

ARTICLE XIV.

The United States do furthermore discharge the Mexican republic from all claims of citizens of the United States, not heretofore decided against the Mexican government, which may have arisen previously to the date of the signature of this treaty; which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in the following article, and whatever shall be the total amount of those allowed.

ARTICLE XV.

The United States, exonerating Mexico from all demands on account of the claims of their citizens mentioned in the preceding article, and considering them entirely and forever cancelled, whatever their amount may be, undertake to make satisfaction for the same, to an amount not exceeding three and

one quarter millions of dollars. To ascertain the validity and amount of those claims,, a board of commissioners shall be established by the government of the United States, whose awards shall be final and conclusive: provided, that in deciding upon the validity of each claim, the board shall be guided and governed by the principles and rules of decision prescribed by the first and fifth articles of the unratified convention, concluded at the city of Mexico on the twentieth day of November, one thousand eigth hundred and forty-three; and in no case shall an award be made in favor of any claim not embraced by these principles and rules.

If, in the opinion of the said board of commissioners, or of the claimants, any books, records or documents in the possession or power of the government of the Mexican republic, shall be deemed necessary to the just decision of any claim, the commissioners, or the claimants through them, shall, within such period as Congress may designate, make an application in writing for the same, addressed to the Mexican Minister for Foreign Affairs, to be transmitted by the Secretary of State of the United States; and the Mexican government engages, at the earliest possible moment after the receipt of such demand, to cause any of the books, records, or documents, so specified, which shall be in their possession or power, (or authenticated copies or extracts of the same,) to be transmitted to the said Secretary of State, who shall immediately deliver them over to the said board of commissioners: *Provided,* That no such application shall be made by, or at the instance of, any claimant, until the facts which it is expected to prove by such books, records, or documents, shall have been stated under oath or affirmation.

ARTICLE XVI.

Each of the contracting parties reserves to itself the entire right to fortify whatever point within its territory it may judge proper so to fortify, for its security.

ARTICLE XVII.

The treaty of amity, commerce, and navigation, concluded at the city of Mexico on the fifth day of April, A. D. 1831, between

the United States of America and the United Mexican States, except the additional article, and except so far as the stipulations of the said treaty may be incompatible with any stipulation contained in the present treaty, is hereby revived for the period of eight years from the day of the exchange of ratifications of this treaty, with the same force and virtue as if incorporated therein; it being understood that each of the contracting parties reserves to itself the right, at any time after the said period of eight years shall have expired, to terminate the same by giving one year's notice of such intention to the other party.

ARTICLE XVIII.

All supplies whatever for troops of the United States in Mexico, arriving at ports in the occupation of such troops previous to the final evacuation thereof, although subsequently to the restoration of the custom-houses at such ports, shall be entirely exempt from duties and charges of any kind; the government of the United States hereby engaging and pledging its faith to establish, and vigilantly to enforce, all possible guards for securing the revenue of Mexico, by preventing the importation, under cover of this stipulation, of any articles other than such, both in kind and in quantity, as shall really be wanted for the use and consumption of the forces of the United States during the time they may remain in Mexico. To this end, it shall be the duty of all officers and agents of the United States to denounce to the Mexican authorities at the respective ports any attempts at a fraudulent abuse of this stipulation which they may know of or may have reason to suspect, and to give to such authorities all the aid in their power with regard thereto; and every such attempt, when duly proved and established by sentence of a competent tribunal, shall be punished by the confiscation of the property so attempted to be fraudulently introduced.

ARTICLE XIX.

With respect to all merchandise, effects, and property whatsoever, imported into ports of Mexico whilst in the occupation

of the forces of the United States, whether by citizens of either republic, or by citizens or subjects of any neutral nation, the following rules shall be observed: —

1. All such merchandise, effects, and property, if imported previously to the restoration of the custom-houses to the Mexican authorities, as stipulated for in the third article of this treaty, shall be exempt from confiscation, although the importation of the same be prohibited by the Mexican tariff.

2. The same perfect exemption shall be enjoyed by all such merchandise, effects, and property, imported subsequently to the restoration of the custom-houses, and previously to the sixty days fixed in the following article for the coming into force of the Mexican tariff at such ports respectively; the said merchandise, effects, and property being, however, at the time of their importation, subject to the payment of duties, as provided for in the said following article.

3. All merchandise, effects, and property described in the two rules foregoing shall, during their continuance at the place of importation, and upon their leaving such place for the interior, be exempt from all duty, tax, or impost of every kind, under whatsoever title or denomination. Nor shall they be there subjected to any charge whatsoever upon the sale thereof.

4. All merchandise, effects, and property, described in the first and second rules, which shall have been removed to any place in the interior whilst such place was in the occupation of the forces of the United States, shall, during their continuance therein, be exempt from all tax upon the sale or consumption thereof, and from every kind of impost or contribution, under whatsoever title or denomination.

5. But if any merchandise, effects, or property, described in the first and second rules, shall be removed to any place not occupied at the time by the forces of the United States, they shall, upon their introduction into such place, or upon their sale or consumption there, be subject to the same duties which, under the Mexican laws, they would be required to pay in such cases if they had been imported in time of peace, through the

maritime custom-houses, and had there paid the duties conformably with the Mexican tariff.

6. The owners of all merchandise, effects, or property described in the first and second rules, and existing in any port of Mexico, shall have the right to reship the same, exempt from all tax, impost, or contribution whatever.

With respect to the metals, or other property, exported from any Mexican port whilst in the occupation of the forces of the United States, and previously to the restoration of the custom-house at such port, no person shall be required by the Mexican authorities, whether general or state, to pay any tax, duty, or contribution upon any such exportation, or in any manner to account for the same to the said authorities.

ARTICLE XX.

Through consideration for the interests of commerce generally, it is agreed, that if less than sixty days should elapse between the date of the signature of this treaty and the restoration of the custom-houses, conformably with the stipulation in the third article, in such case all merchandise, effects, and property whatsoever, arriving at the Mexican ports after the restoration of the said custom-houses, and previously to the expiration of sixty days after the day of the signature of this treaty, shall be admitted to entry; and no other duties shall be levied thereon than the duties established by the tariff found in force at such custom-houses at the time of the restoration of the same. And to all such merchandise, effects, and property, the rules established by the preceding article shall apply.

ARTICLE XXI.

If unhappily any disagreement should hereafter arise between the governments of the two republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said governments, in the name of those nations, do promise to each other that they will endeavor, in the most sincere and earnest manner, to settle

the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves; using, for this end, mutual representations and pacific negotiations. And if, by these means, they should not be enabled to come to an agreement, a resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind, by the one republic against the other, until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case.

ARTICLE XXII.

If (which is not to be expected, and which God forbid!) war should unhappily break out between the two republics, they do now, with a view to such calamity, solemnly pledge themselves to each other and to the world, to observe the following rules; absolutely where the nature of the subject permits, and as closely as possible in all cases where such absolute observance shall be impossible: —

1. The merchants of either republic then residing in the other shall be allowed to remain twelve months, (for those dwelling in the interior,) and six months (for those dwelling at the seaports,) to collect their debts and settle their affairs; during which periods, they shall enjoy the same protection, and be on the same footing, in all respects, as the citizens or subjects of the most friendly nations; and, at the expiration thereof, or at any time before, they shall have full liberty to depart, carying off all their effects without molestation or hinderance, conforming therein to the same laws which the citizens or subjects of the most friendly nations are required to conform to. Upon the entrance of the armies of either nation into the territories of the other, women and children, ecclesiastics, scholars of every

faculty, cultivators of the earth, merchants, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all persons whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments unmolested in their persons. Nor shall their houses or goods be burnt or otherwise destroyed, nor their cattle taken, nor their fields wasted, by the armed force into whose power, by the events of war, they may happen to fall; but if the necessity arise to take any thing from them for the use of such armed force, the same shall be paid for at an equitable price. All churches, hospitals, schools, colleges, libraries, and other establishments for charitable and beneficent purposes, shall be respected, and all persons connected with the same protected in the discharge of their duties, and the pursuit of their vocations.

2. In order that the fate of prisoners of war may be alleviated, all such practices as those of sending them into distant inclement or unwholesome districts, or crowding them into close and noxious places, shall be studiously avoided. They shall not be confined in dungeons, prison-ships or prisons; nor be put in irons, or bound, or otherwise restrained in the use of their limbs. The officers shall enjoy liberty on their paroles, within convenient districts, and have comfortable quarters; and the common soldier shall be disposed in cantonments, open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for its own troops. But if any officer shall break his parole by leaving the district so assigned him, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual, officer, or other prisoner, shall forfeit so much of the benefit of this article as provides for his liberty on parole or in cantonment. And if any officer so breaking his parole, or any common soldier so escaping from the limits assigned him, shall afterwards be found in arms, previously to his being regularly exchanged, the person so offending shall be dealt with according to the established laws of war. The officers shall be daily furnished by the party in whose power they are, with as many rations, and of

the same articles, as are allowed, either in kind or by commutation, to officers of equal rank in its own army; and all others shall be daily furnished with such ration as is allowed to a common soldier in its own service: the value of all which supplies shall, at the close of the war, or at periods to be agreed upon between the respective commanders, be paid by the other party, on a mutual adjustment of accounts for the subsistence of prisoners; and such accounts shall not be mingled with or set off against any others, nor the balance due on them be withheld, as a compensation or reprisal for any cause whatever, real or pretended. Each party shall be allowed to keep a commissary of prisoners, appointed by itself, with every cantonment of prisoners, in possession of the other; which commissary shall see the prisoners as often as he pleases; shall be allowed to receive, exempt from all duties or taxes, and to distribute, whatever comforts may be sent to them by their friends; and shall be free to transmit his reports in open letters to the party by whom he is employed.

And it is declared that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending the solemn covenant contained in this article. On the contrary, the state of war is precisely that for which it is provided; and during which, its stipulations are to be as sacredly observed as the most acknowledged obligations under the law of nature or nations.

ARTICLE XXIII.

This treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof; by the President of the Mexican republic, with the previous approbation of its General Congress; and the ratifications shall be exchanged in the city of Washington, or at the seat of government of Mexico, in four months from the date of the signature hereof, or sooner if practicable.

In faith whereof, we, the respective plenipotentiaries, have signed this treaty of peace, friendship, limits, and settlement; and have hereunto affixed our seals respectively. Done in quintuplicate, at the city of Guadalupe Hidalgo, on the second day

of February, in the year of our Lord one thousand eight hundred and forty-eight.

N. P. TRIST, [L.S.]
LUIS G. CUEVAS, [L.S.]
BERNARDO COUTO, [L.S.]
MIGL. ATRISTAIN, [L.S.]

APPENDIX B-2

CHAP. XLI. — *An Act to ascertain and settle the private Land Claims in the State of California.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

SEC. 2. *And be it further enacted,* That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

SEC. 3. *And be it further enacted,* That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

SEC. 4. *And be it further enacted,* That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment of the President, require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case,whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time

and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

SEC. 5. *And be it further enacted,* That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

SEC. 6. *And be it further enacted,* That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses in any case pending before the commissioners, that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

SEC. 7. *And be it further enacted,* That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpoena commanding the attendance of a witness or witnesses before the said board or any commissioner.

SEC. 8. *And be it further enacted,* That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of

the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

SEC. 9. *And be it further enacted,* That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court

thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

SEC. 10. *And be it further enacted,* That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

SEC. 11. *And be it further enacted,* That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 12. *And be it further enacted,* That to entitle either party to a review of the proceedings and decision of the commissioners herein before provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

SEC. 13. *And be it further enacted,* That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of

the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided, always,* That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further,* That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

SEC. 14. *And be it further enacted,* That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities

thereof, nor to any city, or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village.

Sec. 15. *And be it further enacted,* That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

Sec. 16. *And be it further enacted,* That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

Sec. 17. *And be it further enacted,* That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

Sec. 18. *And be it further enacted,* That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

APPROVED, MARCH 3, 1851.

APPENDIX C-1

PATENT FOR RANCHO LA BALLONA

The United States of America
To all to whom these presents shall come
Greeting:

Whereas it appears from a duly authenticated transcript filed in the General Land Office of the United States that pursuant to the provisions of the Act of Congress approved the third day of March One thousand eight hundred and fifty one entitled "An Act to ascertain and settle the Private Land Claims in the State of California" Augustin and Ignacio Machado and Felipe and Tomas Talamantes as claimants, filed their petition on the second day of October Anno Domini One thousand and eight hundred and fifty two with the commissioners to ascertain and settle the private land claims in the State of California sitting as a Board in the City of Los Angeles in which petition they claimed the confirmation of their title to a tract of land known by the name of "Ballona" situate in the County of Los Angeles and State aforesaid said claim being founded on a Mexican Grant to Augustin and Ignacio Machado and Felipe and Tomas Talamantes made in the twenty seventh day of November A.D. One thousand eight hundred and thirty nine by Juan B. Alvarado then constitutional Governor of the Department of the Californias.

And whereas the Board of Land Commissioners aforesaid on the fourteenth day of February Anno Domini, One thousand eight hundred and fifty four in the cause entitled "Augustin Machado, Ignacio Machado, Felipe Talamantes and Tomas Talamantes vs. the United States" rendered a decree of confirmation in favor of the claimants which said decree or decision having been taken by appeal to the District Court of the United States for the Southern District of California the said District Court at its December Term 1855, in the cause entitled "Augustin Machado et al Appellees ads. The United States appellants" rendered its decree as follows to wit:

It is ordered adjudged and decreed that the said decision be confirmed and it is further ordered adjudged and decreed that the claim of the appellees to a certain tract of land in Los Angeles County west of the City of Los Angeles about three leagues and bordering on the sea shore called Ballona is valid, that the said tract of land being the same and for the last 18 or 19 years occupied by the appellees and bounded as follows viz. Beginning at a cottonwood tree at a considerable distance from the house of said rancho which is marked with hatchet cuts, thence running east 7835 varas to a little pole bridge thence south 9800 varas to the mouth of a creek (Estero). Thence west along the sea coast 7300 varas to the deep gullies (barrancas) thence northerly 7800 varas to the place of beginning reference for a more particular description being had to the grant map and judicial possession on file in the case.

And thereafter a stipulation having been made by the attorneys of the parties in interest that appeal in this case would not be prosecuted to the Supreme Court of the United States and filed in the aforesaid District Court. The said District Court at its December Term A.D. 1856 ordered adjudged and decreed That the order granting the appeal to the Supreme Court be revoked and that the decree of confirmation heretofore made by this Court in the said cause to wit: On the 19th day of December A.D. 1855 be and the same is now hereby made final. Whereby the proceedings Court upon title became final.

And whereas under the 13th Section of Said Act of 3 March 1851 and the supplemental legislation and in accordance with the proceedings had pursuant to said act and supplemental legislation there has been deposited in the General Land Office a return with the descriptive notes and plat of survey of the said claim confirmed as aforesaid authenticated by the signature of the United States Surveyor General for the State of California which descriptive notes and plat of survey are in the words and figures as follows to wit:

U.S. Surveyor General's Office
San Francisco, Cal.

Under and by virtue of the provisions of the 13th Section of the Act of Congress of the third of March 1851 entitled "An Act to ascertain and settle the private land claims in the State of California" and of the 12th Section of the Act of Congress approved on the 31st of August 1852 entitled "An Act making appropriations for the civil and diplomatic expenses of the Government for the year ending the 30th of June 1853 and for other purposes" and whereas the U.S. District Court for the Southern District of California rendered a decision whereby it recognized and confirmed the title and claim of Augustin Machado *et als.* to the tract of land designated as the Ballona in Los Angeles Co. as appears from the certified copy of the final Decree of the said District Court a copy of which is hereto annexed. The said tract of land was surveyed in conformity to the grant thereof and the said decision, And I hereby certify that the accompanying map is a true and accurate plat of the said tract of land as appears by the field notes of the survey thereof made by Henry Hancock, Deputy Surveyor under the direction of this office which having been examined and approved remain of record therein, said tract of land is described in the words and figures following viz.

Beginning at a pile of rubble rocks each some nine inches in diameter on a high conical hill being the north western terminus of a range of hills on the east.

Thence according to the true meridian the variation of the magnetic needle being thirteen degrees thirty minutes east, south twenty one degrees fifteen minutes east, ascending the ridge eighty chains to the top and along the same one hundred and seven chains and twenty one links to a sandstone rock, twenty one inches in diameter and two small rocks station.

Thence south forty eight degrees thirty minutes west one hundred chains to the base of hills one hundred and eight chains to the base of a spur from the east. One hundred and twenty five chains to a stake on a spur from the north east about four chains south of a lake of water some fifteen chains long and five chains wide station.

Thence south twenty three degrees forty five minutes west, at one chain and fifty links crosses a road, course east four chains to a stake station.

Thence south seventy six degrees thirty minutes west, at three chains enters the mouth of a cañada from the north east, at three chains and fifty links crosses a stream fourteen links wide course south eight chains and eight links to a stake and charred stake at intersection with the east boundary of Township Two, south range fifteen west eleven chains and fifty links north of a quarter section corner on the east boundary of section twenty four, twenty five chains across a cañada to the north base of hills thirty four chains and eight links to a large rock, the original corner and station.

Thence south twenty four degrees forty five minutes west thirty two chains to a stake on the north west base of the hills station.

Thence south seventy two degrees thirty minutes west along the base of hills thirty two chains and thirty three links to a stake station.

Thence south sixty six degrees, thirty minutes west along the north base of hills nineteen chains and sixty two links to a stake at the north east corner of a decayed corral. Station.

Thence south sixty four degrees fifteen minutes west nineteen chains and fifty links to a stake at base of hills Station.

Thence south fifty four degrees thirty minutes west, five chains to a point opposite the south east head of a bay twenty three chains to a stake on the west base of the hills thirty links east of the bay station, from which the average bearing of the north east shore of the bay is about north west, and at one hundred chains the Ballona creek discharges itself into the bay.

Thence south nine degrees forty five minutes west, seventeen chains to a stake on the east base of hills, six chains from the east shore to the lake station.

Thence south fifty three degrees west seventeen chains and thirty three links to a stake eight links east of the bay shore at the north base of hills station.

Thence north eighty one degrees west six chains to a stake sixty links south of the bay shore station.

Thence north fifty two degrees forty five minutes west fourteen chains and fifty links to a stake on the shore of the bay station.

Thence south seventy three degrees west eight chains to a stake station.

Thence south twenty eight degrees forty five minutes west five chains to a stake fifty links from the shore of the bay station.

Thence south sixty degrees forty five minutes west twenty one chains to a stake station.

Thence south eighty two degrees thirty minutes west seven chains to a stake on the north base of high hills station from which a pass in the said hills bears north eighty eight degrees forty five minutes west.

Thence south fifty two degrees west fifteen chains to a stake at north base of high hills station.

Thence south eighty two degrees west ten chains to a stake at the edge of bay station.

Thence south sixty degrees forty five minutes west eight chains to a stake at the north base of high hills and on the shore of bay sation.

Thence south fifty degrees forty five minutes west nine chains to a stake station.

Thence south forty three degrees fifteen minutes west at eleven chains and fifty links leaves the shore of the bay and enters sand hills eight and ten chains wide extending far to the north west nineteen chains and fifty links to a stake station at the east shore of the inlet from which the east shore of the inlet ranges north, twenty degrees west. The inlet for about one hundred and thirty chains is from eight to ten chains wide.

Thence south forty five degrees nine minutes west, eight chains and twenty one links to a stake and charred stake station on the west shore of the inlet.

Thence north twenty five degrees thirty minutes west forty three chains to a stake at high water mark on shoal water bay of the Pacific Ocean station.

Thence north twenty five degrees forty five minutes west sixty five chains to a stake at high water mark station.

Thence north thirty five degrees thirty minutes west one hundred and sixty chains to a stake at high water mark station.

Thence north thirty nine degrees thirty minutes west thirty chains to a stake station.

Thence north forty one degrees thirty minutes west thirty chains to a stake at high water mark station.

Thence north thirty seven degrees fifteen minutes west six chains to a stake at high water mark station.

Thence north sixty two degrees west one chain and fifty six links to a post opposite the mouth of the first barranca or gully being the north west corner of this rancho station.

Thence north forty nine degrees east two chains to base of southerly side of barranca with an average of one chain wide and the banks about thirty feet high coming from the north thirty eight chains to a stake in the pile of rocks on the high rolling table land extending south east for the distance of about one mile and terminating in low table land and bordering on the Ballona Bay which bay has its terminus at a distance of about one hundred chains south east from this point station.

Thence north fifty seven degrees one minute east one hundred and fifty two chains and ninety one links to four large rocks, station.

Thence north fifty nine degrees east eighty chains and twenty four links to a point at intersection with the south boundary of section thirty four in Township One south of range fifteen west, nineteen chains and ninety three links west of the quarter section corner eighty two chains and fifty links to a road, course west one hundred and twenty six chains and sixty four links to three large rocks each fifteen inches in diameter station.

Thence north fifty nine degrees and thirty minutes east fifty two chains to the rocks each eighteen inches in diameter station.

Thence north sixty three degrees east two hundred and forty one links to a stake being the most northerly corner of this ranch and station from which a willow tree twenty four inches in diameter bears south eighty degrees east distant three hundred and thirty two links (being a point agreed upon as the point where the alamo or cottonwood tree formerly stood).

Thence south fifty seven degrees thirty minutes east thirty nine chains opposite to and two chains east of a dry bed of a lake ten chains from east to west and three chains from north to south forty four chains and fifty links to a point cutting the south east corner of the lake at sixty two chains and fifty links crosses a road course east ninety chains to the center of a ravine thirty feet deep ninety six chains to a stake and charred stake at intersection with the south boundary of section thirty six in Township One south of range fifteen west, twelve chains and fifty eight links west of quarter section corner one hundred and thirteen chains and fifty six links to a stake and charred stake one hundred and fifty links north of a bunch of tunas, station.

Thence south fifty four degrees forty five minutes, east forty five chains and seventy nine links to a stake and charred stake at intersection with the west boundary of Township Two, south of range fourteen west thirty six chains and seventy five links south of the north west corner of said Township, eighty six chains and fifty nine links to a rock two and one half feet long eighteen inches wide and twelve inches thick imbedded in the earth being an original corner station, and

Thence south fifty nine degrees thirty minutes east nine chains and fifty links to timber at eleven chains and fifty links, crosses a stream of water eighteen links wide skirted with sycamore trees course south west at eighteen chains and fifty links crosses a road course southwest to base of hills some three hundred feet high and leaves timber, thirty eight chains and eighty one links to the place of beginning containing thirteen

thousand nine hundred and nineteen acres and ninety hundredths of an acre and being designated upon the plat of the public surveys as lot numbered thirty seven in Township One south of range fifteen west lot numbered thirty seven in Township Two south of range fifteen west of the San Bernardino meridian.

In witness whereof I have hereunto signed my name and caused the seal of the said office to be affixed at the city of San Francisco this Twenty third day of November A.D. 1873.

J.R. Hardenbergh
U.S. Surveyor General
for California

[MAP]

Now know ye that the United States of America in consideration of the premises and pursuant to the provisions of the Act of Congress aforesaid of 3rd March 1851 and the legislation supplemental thereto have given and granted and by these presents do give and grant unto the said Augustin Machado et al and to their heirs the tract of land embraced and described in the foregoing survey but with the stipulation that in virtue of the fifteenth section of the said Act neither the confirmation of this said claim nor this patent shall affect the interests of third persons.

To Have and to Hold the said tract with the appurtenances unto the said Augustin Machado et al and to their heirs and assigns forever with the stipulation aforesaid.

In testimony whereof I Ulysses S. Grant, President of the United States have caused these Letters to be made Patent and the seal of the General Land Office to be hereunto affixed:

Given under my hand at the City of Washington this eighth day of December in the year of our Lord One

Thousand Eight Hundred and Seventy Three and of the Independence of the United States the ninety eighth.

By the President U. S. Grant
By S. D. Williamson, Secretary

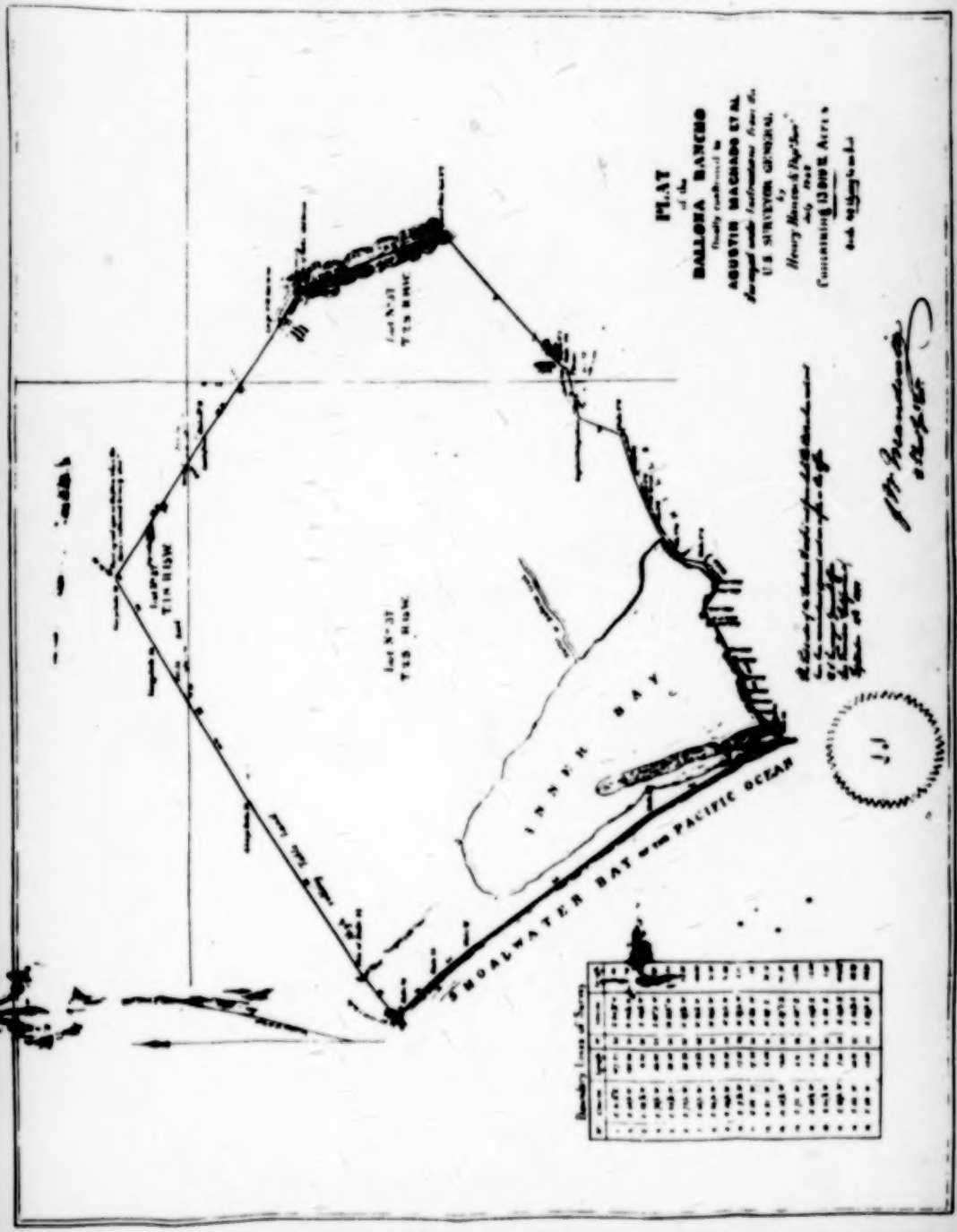
L. K. Lippincott
Recorder of the General Land Office
Recorded Vol. pp. 484 to 493 inclusive.

A full true and correct copy of the original recorded at request of Francisco Machado January 26th 1874 at 50 min. past 10 a.m.

A. W. Potts, Recorder
By C. W. Gould, Deputy

APPENDIX C-2

PLAT OF RANCHO LA BALLONA



APPENDIX D-1

J. W. Mandeville, Esq.
U.S. Surveyor General
San Francisco, Cala.

General Land Office
March 17, 1860

Sir:

The survey of the "Ballona" Rancho finally confirmed to Augustin Machade, et al is not approved.

Our objections to the survey are fully set forth in the following:

The confirmation is by boundaries. Beginning at a Cottonwood tree, running East 7835 varas, to a pole bridge, thence South 9800 varas to mouth of a creek (Estero) thence West along the Sea Coast 7300 varas to the deep gullies (Barrancas) thence Northerly 7800 varas to the place of beginning.

The survey returned is for 13,919 $^{90}/_{100}$ acres. A survey according to the courses and distances mentioned would not enclose that quantity by perhaps 2,000 acres. The plat shows however a large body of water called "Inner Bay" some three miles long by one wide, which is included in this area. There is no mention made of quantity in the grant or decree. When the Claimant comes to petition the Board, he describes the grant by its boundaries as above, and adds "containing one league of grazing land more or less." This is understood however to refer to the quantity of land of a particular character, that is "grazing" land within the Rancho. And this view is sustained by the Map (Diseño) on which about one third of the tract is shaded green and marked "Tierras de Siembra" (cultivated lands) the residue being marked "Somas Muertas" (barren hills). The grant and juridical possession referred to throw no further light upon the matter; the courses and distances being those of the decree. The Diseño bears a strong resemblance in form to the Survey, but that remarkable feature in the latter, the Inner Bay, is not shown on the former. A prominent natural object on the Diseño is a creek, name illegible, running Southerly through the Eastern part of the Rancho, and emptying into a

body of Water, designated "Playa" (coast or shore) which makes a boundary on one side of the Rancho.

The only creek found on the survey is one called "Ballona Creek" — doubtless the same above referred to. It empties into the "Inner Bay" not far from the South East corner of the Claim and from the Diseño it is plain that the body of water, into which this creek falls, is the boundary of the Rancho on that side. It is the only "Playa" found on the map and there is but one stream laid down. There would then appear to be no authority for embracing this Bay in the survey.

Had such an object existed within the grant, it could not have been overlooked or neglected in sketching the Diseño, nor have escaped notice and mention in the juridical possession. Again — the Diseño is drawn with some care, and the points of the Compass are designated thereon in the usual manner, and with tolerable accuracy, allowing for the variation of the Compass which is 13° 30′ East. It shows the North boundary a due East line. From the survey it appears that the place where the "Cottonwood" (place of beginning, see decree & c) formerly stood, was ascertained and agreed upon. That found, the survey should have run East therefrom (or at least the varation from that course should not have been greater than the ascertained variation of the Compass) 7835 varas — thence Southerly 9800 varas to a point on the shore (see diseño) a little East, of the mouth of the creek (Ballona). Thence along the coast (Playa) of the Inner Bay 7300 varas to the gullies (Barrancas) which will probably be found at the North end of this Bay — thence to the place of beginning.

How runs the Survey?

In the North East boundary, (which answers to the North of the decree) from the "Cottonwood" to the "Sand Stone Rock No. 2" there is an average departure of about 40° from an East course, treble the variation. Hence when the next line comes to be run, the South course for 9800 varas cannot be had without running to the Pacific coast, South of Inner Bay. But let the first line be run from the "Cottonwood" (and this it is presumed should have been the point of beginning) East, or at least not

more than 13° 30′ South of East, the distance called for of 7835 varas or about 326 chains, and we can then run from the point thus reached, 9800 varas before the Shore (Playa) of the Inner Bay is reached. Thence following that shore North West (West by the decree) to its Northern extremity and thence Northerly to the Cottonwood, and it is believed that the tract granted would be embraced within the lines, and a survey presented in accordance with the grant and decree.

The case is remanded for re-examination and unless good cause be shown to the contrary after notice to all concerned, for amendment of the survey, in conformity to the views of this Office as set forth in the foregoing.

Very respectfully

Your Obt. Servt.

Jos. S. Wilson
Commissioner

APPENDIX D-2

R. Hardenbergh, Esq.,
U.S. Surveyor General
San Francisco, Cal.

Department of the
Interior
General Land Office
Washington D.C.
Apr. 30, 1873

Sir;

This office has had under consideration the papers in the matter of the rancho Ballona in California. Augustin Machado et al. confs. a survey of which containing 13,919$^{90}/_{100}$ acres, was made by Deputy Surveyor Henry Hancock in July, 1858, approved by the Surveyor General of California Sept. 18, 1858 advertised October, 1860, and re-advertised in 1869.

The original grant was made on the 29th, Nov. 1839, by Juan B. Alvarado, then Governor of the Department of the Californias, to Augustin and Ignacio Machado and Felipe and Tomas Talamantes for the land known by the name of Ballona, bounded on the West by the ranch of the citizen Policarpio Higueroa, on the North by that of the citizen Alains; on the West (poniente mistake for Este) by that of the citizen A. Ignacio Abila, and on the South by that of the Sr. Jose Sepulveda. Juridical possession of the land granted was given on the 31st December, 1839 with the following described boundaries, to wit: "From the cotton-wood tree, to which cuts of a hatchet were given, to serve for a land mark a direction to the East were measured and counted seven thousand eight hundred and thirty-five varas, terminating at a little pole bridge which was fixed for a land mark at which point was the adjoining neighbor, Don Policarpio Higueroa, he not having manifested any objection it was given for a perpetual measurement. From thence the cord was stretched a direction towards the South, and were measured and counted nine thousand and eight hundred varas which terminated at the mouth of a creek (estero) a place which was fixed for a land mark, but when it was measured Antonio Ignacio Abila charged that this situation or place belonged to him, and having asked him for the documents

which would prove it his property he did not present them, but said the plat (diseño) was in Monterey for which cause it was fixed for a measurement. Proceeding to stretch the cord towards the west there were measured along the Sea-coast seven thousand and three hundred varas, which terminated at a point called the deep gullies ('barrancas') a situation which was fixed for a land mark. From there the rope was stretched in a direction towards the North, taking a course so as to strike the cotton-wood tree, whence the measuring was commenced, and there were measured seven thousand and eight hundred varas, the adjoining neighbors being Francisco Sepulveda & Maximo Ulinis, the former although he indicated that he had asked the Government for a small piece of this land; but as he did not present the memorial ('constancia') nor documents these were continued, and the measurement given.

The petition of the claimants soliciting the confirmation of their claim was presented on the 2nd day of October, 1852, to the Board of Land Commissioners and on the 24th of February, 1854, the said Board rendered a decree of confirmation for the land as described in the record of Juridical possession and on appeal to the District Court of the United States for the Southern District of California the decision of the Board of Land Commissioners was confirmed at the December Term 1855 of said Court, and it was "further ordered adjudged and decreed that the claim of the appellees to a certain tract of land in Los Angeles County, West of the City of Los Angeles — about three leagues and bordering on the sea shore called the 'Ballona' is valid, that said tract of land being the same now and for the last 18 or 19 years occupied by the appellees, and bounded as follows viz: Beginning at a cotton-wood tree at a considerable distance from the house of said rancho which is marked with hatchet cuts, thence running East 7836 varas to a little pole bridge thence South 9800 varas as to the mouth of a creek (Estero) thence West along the sea coast 7300 varas to the deep gullies (Barancos) thence Northerly 7800 varas to the place of beginning; reference for a more particular description being had to the grant, map and juridical possession on file in this case." At the December Term, 1856, of said court the appeal to the

Supreme Court of the United States was dismissed and the decree rendered on the 19th day of December, 1855, made final.

A survey of this rancho was made by Henry Hancock in July, 1858, approved by the U.S. Surveyor General for Cal'a, on the 18th of Sept. 1858 and transmitted to this Office immediately thereafter, which said survey after examination here, was returned to the Sur. Gen'l. on the 17th day of March, 1860, for re-examination, and "unless good cause be shown to the contrary, after notice to all concerned, for amendment of the survey in conformity to the views of this office as set forth in" said letter of March 17, 1860. What those views were it is not necessary now to examine, for before the survey was amended the Act of July 1st 1864, (13 stats, p. 332) was passed; the Honorable Secretary of the Interior by letter of November 19th, 1868, directed this survey to be published under said Act; and the said survey having been so published in March and April, 1869 was duly objected to in accordance with the provisions of said Act, and is therefore now before this office, on its merits, without regard to any opinion expressed by this office prior to said publication.

This rancho was confirmed by boundaries and these boundaries are clearly set forth in the final decree of confirmation. The survey now under consideration must conform to said boundaries as explained by the reference in the decree to the grant, diseño and juridical possession.

For convenience I commence the examination of this survey by a consideration of the line drawn between two of the natural objects mentioned in the record of juridical possession and final decree in this case, to wit, the barancas or deep gullies and the alamos or cottonwood tree, the last of which is described in the record as the place from which juridical measurement was commenced.

The first named of these natural objects is not shown on the diseño of the Ballona rancho, nor is it mentioned in any of the original papers filed in this case before the Board of Land Commissioners for Cal'a, except in the juridical possession where it is described as having been reached by measuring from

the mouth of an estero, West, along the sea-coast seven thousand three hundred varas. On the present survey these gullies are located at the extreme south-western corner thereof.

The second of these natural objects is not particularly described on the diseño in this case, though at the North-west corner of said diseño is marked "laguna del Alamo y lindero del ser Alamis" (lake of the cottonwood and boundary of Senor Alamis). The directions of the lines run, as given both in the juridical possession and final decree, show however, that this cottonwood tree was at the northwest corner of the Ballona rancho, a "long distance" west from the "house" of said rancho, and also west 9835 varas from "a little pole bridge," and in making the survey now before me the deputy surveyor has scaled the site of said cottonwood at the northwest corner of his survey, and at the intersection of the southern line of the rancho Rincon de los Buyes, granted in 1821, and 1843, to B. Higuera and patented Aug. 27th, 1872, with the south-eastern line of the rancho San Jose de Buenos Ayres granted in 1843, to M. Alamis and patented July 25th, 1866. Less than forty chains east from this point, as appears by the field-notes of the survey in this case, is a dry lake ten chains from east to west and three chains from North to South, thus apparently answering the description of the northeastern corner of this rancho on the diseño where is found the "lake of the cottonwood and the boundary of Alamis" i.e. rancho San Jose de Buenos Ayres. The diseño further shows the Western boundary of the Ballona to be the eastern boundary of Sepulveda's rancho San Vicente, and the record of juridical possession shows that this boundary of Ballona was also the eastern boundary of a part of Maximo Alimas's rancho, the last of which was patented by the U.S. in 1866 as before stated. It also appears by an inspection of the diseño, and of the plat of Hancock's survey that the relative position of the northwest and southwest corners and the creek as shown on both diseño and plat, is substantially the same.

The testimony filed by contestants relative to this boundary is as follows:

Fernando Sepulveda in an affidavit dated April 26th, 1869, before A. E. Sepulveda, Deputy Clerk of the Dist. Court for Los Angeles Co. Cal'a, testifies that he was raised upon the rancho San Vicente y Santa Monica; that his father was the grantee of said rancho; that at the time of Juridical possession of said rancho in 1828, the east boundary line was established by measuring from the head of the arroyo Seca at a place called Cañada de mangles and ending at the opening of said arroyo into the sea at a place called deep gullies and including the Laguna de los Alamos and loma colorada; that the deep gullies are very near the margin of the estuary of the seca in the Ballona rancho; that the Ballona rancho never extended west of a north and south line running from the loma colorada to the deep gullies; and that the survey of the Ballona as now made running from the arroyo seca, south west to the ocean, embraces a large portion of the rancho San Vicente y Santa Monica. There is also filed on behalf of contestants an affidavit dated May 3, 1869, signed by Salesburg Haley and Jose Dolores Sepulveda to the effect that they are the owners of the San Vicente y Santa Monica confirmed to Ramon Serrano Sepulveda L.C. No. 457, which rancho adjoins the rancho Ballona on the west; that they are familiar with all the boundaries of the rancho owned by them as marked out in 1828, by Jose A. Carillo; that the east boundary line of said rancho embraces the following known objects, to wit, the "Canada de Mangles, the Arroyo Alamis or seca, the laguna de Alamo, the table land to the loma colorado, thence in a direct line to the deep gullies at the sea beach near to the estuary of the Ballona;" and that the present survey of the rancho Ballona embraces a large tract of the rancho San Vicente y Santa Monica.

In opposition to the statements contained in the foregoing, there was filed in behalf of the owners of Ballona with the Sur. Gen'l the following affidavits:

1st. Affidavit dated January 29, 1870, by Jose del Carmen Sepulveda in which he states that he is 47 years of age, a citizen of Los Angeles, and the son of Francis Sepulveda

claimant for the rancho San Vicente adjoining the Ballona on the northwest; that he is well acquainted with said ranchos and was present when juridical possession was given by the Mexican authorities of the line between said ranchos, and knows the position of the cottonwood (alamos) trees and the deep gullies (barrancas); that the tree decayed and fell to the ground and thereafter the place where it stood was marked by a pile of stones; that the deep gullies are prominent and easily known, and that the corners fixed by the U.S. Surveyor Hancock are at the identical places where the alamos stood and where the barrancas now are and were at the time of juridical measurement; that the line of Hancock's survey between those two points is substantially the line of the juridical possession; and that for many years before Hancock's survey this line has been recognized as the dividing line between those two ranchos.

2d. The affidavit dated Jany 29, 1870, by Tomas Talamantes in which affiant states he is 78 years of age a resident of Los Angeles and one of the grantees of the rancho Ballona granted by Alverado, and was present when the juridical possession of said rancho was given in 1839; that the line of the juridical survey between the Ballona and San Vicente ranchos was a direct line from the cottonwood trees to the deep gullies; that the line of Hancock's survey between these two points is substantially that of the juridical possession; that he was also present when possession was given of the rancho San Vicente in 1846, as was also Francis Sepulveda and Augustin Machado; that a line was run from the cottonwood to the barrancas which was the same as that established in 1839, as the line of the rancho Ballona, and that Sepulveda, Machado, and affiant agreed to the same.

3d. An affidavit dated January 29, 1870, by Ignacio Machado in which affiant states he is 80 years of age, a resident of Los Angeles, Cal'a, and one of the original grantees in 1839 of the rancho Ballona; that he was present when juridical possession was given of said rancho, knows the position of the cottonwood tree and deep gullies, the former of which was then about three feet in diameter and

because of its decayed state stones were placed at its roots the better to mark the place; that said tree is now destroyed, but the pile of stones at the date of this affidavit was in about the same condition as when juridical possession was given, easily found and not easily mistaken; that when the possession of the Ballona rancho was given in 1839, Francisco Sepulveda (who died in 1853) was present and said he wanted a piece of the land but upon being asked by the judge if he had any document or grant he replied he had not, whereupon the alcalde (Dominguez) ran the line from said cottonwood to the barrancas; that when Hancock made the survey of the rancho Ballona, Jose del Carmen Sepulveda, and Jose Maria Sepulveda sons of Francisco Sepulveda were present and went with affiant and Hancock and pointed out and agreed upon the Barrancas and the Alamos as the dividing line between San Vicente and Ballona, and that this line as drawn by Hancock is substantially the same as that of the juridical possession.

4th An affidavit dated Feb'y 3d, 1870, by Henry Hancock who swears he is the U.S. Deputy Surveyor who, in 1858, made the survey now under consideration; that at the point marked on the plat of his survey "Station 31. Barranca or gully," Jose del Carmen Sepulveda and Juan Maria Sepulveda were present as the representatives of the rancho San Vicente y. Santa Monica and pointed out said barranca or gully as the place where the rancho San Vicente and Ballona joined each other on the sea shore; that from that point Jose Carmen Sepulveda who was then residing on the ranch was efficient in riding ahead and pointing out the different piles of stone along the plain up to what on the plat of affiants survey is marked "Station 35;" that on arriving at that point, "which is near a small dry arroyo (not marked on the map) some twelve links wide, course southwest, the said Sepulveda and the owner of the Ballona agreed upon a point on the right bank of said arroyo, as the point where the Alamos or cottonwood tree, called for in my instructions as a point in the boundary line of La Ballona, once stood;" that the stations on said map from 31 to 36 were claimed by the

representatives of the ranchos San Vicente and Ballona, as the dividing line of said ranchos; that while running the said line no other points were suggested or talked about by any one; and that at the time of the survey it was understood by the owners of both ranchos that affiant was making the survey for both ranchos.

From a careful review of the foregoing it is clear that the weight of evidence is to the effect that the western boundary of the Hancock survey of the rancho Ballona was correctly located according to the calls of the grant as given in the final decree and record of juridical possession; thus corroborating the apparent location of said boundary as shown by a comparison of the original title papers of the Ballona rancho with each other and with the boundaries of adjoining ranchos. The length of this line according to the measurements given in the final decree and record of possession is 7800 varas equal to about 330 chains: the distance between the barrancas and site of the cottonwood as shown by the U.S. survey is about 360 chains a difference of 30 chains, or 3/8 of a mile.

From the cottonwood the boundary on the north extends east, according to the final decree and record of possession 7835 varas to a "little pole bridge." Where this bridge is located is not shown by any evidence in the case; yet near the northeast corner of the diseño is a stream of water running north and south to an estero near the ocean, from which it is probable that this stream passes near said bridge. On the plat of Deputy Surveyor Hancock's survey the northeast corner thereof is placed near said stream, and to that extent corresponds with the diseño; and as said northern boundary of the rancho Ballona, as shown by said survey adjoins for its entire length the rancho Rincon de los Bueyes which has been patented by the United States and as the length of said line east from the site of the cottonwood to the northeast corner as shown by the survey, is 90 chains, or more than one mile shorter than the length of said line as shown in the record of possession and final decree, I accept as the true boundary on the north the line as run by Hancock and represented on the plat now under consideration.

From the northeast corner the boundary on the east extends according to the final decree and record of possession south 9800 varas, equal to about 413 chains to the mouth of an estero. That this boundary is not a straight line appears by the diseño, and upon an examination of the U.S. Survey it also appears that the general shape of this boundary as given on the diseño has been preserved in said survey, that is to say, from the northeast corner it runs a short distance south and east and then, according to the diseño, due south, but according to the U.S. Survey south and west to the ocean making the entire survey form a nearly square figure. As before stated the call for the south-east corner of this rancho is the mouth of an estero, or where it empties into the ocean, which point as shown by the plat and field notes of the survey by Hancock is at some place east of the south-east corner of said survey and wholly outside its limits. The character of this estero, or inner bay as it is marked on the plat of survey, is testified to by Tomas Talamantes, Jose del C. Sepulveda and Ignacio Machado, who in substance say it is not an arm of the sea, and that much of the tract represented as inner bay is suitable for pasturage. That this estero was included in the grant is shown by the diseño where the word "estero" is written near the south boundary and about midway between the east and west boundaries as there represented, and that it is not an arm of the sea is evident from the field notes and plat of survey which are not contradicted by any evidence in this case, and which show that what this office in 1860, mistook for the mouth of an estero was meandered on its southeast side to within a few chains of the ocean, and that on the east of said meandered line were found high hills, that this inner bay is not an arm of the sea and that the mouth of this estero is wholly outside the present survey of the Ballona rancho is also shown by an official survey of the rancho Sansal Redondo which adjoins the southern portion of the eastern boundary of Hancock's survey of Ballona.

The eastern boundary of this rancho as surveyed by Hancock is therefore approved and so too is the South boundary as thus surveyed, though it is apparent that had the claimants or any party in interest objected to this survey the eastern terminus of

the South boundary and the southern terminus of the eastern boundary might have been extended, according to the final decree on title to the mouth of the estero above mentioned, that is to say to where it empties into the ocean.

As has been already remarked the diseño and the plat of Hancock's survey in this case each inclose a tract of land of nearly square form; and to this I add that the aggregate number of lineal varas measured by the Mexican Alcalde in giving juridical possession as shown by the record thereof, give, when reduced to chains, a distance nearly as great as that run by U.S. Deputy Surveyor Hancock and represented on the aforesaid plat of survey. The distances from point to point are as follows:

According to the record of possession and final decree, from the cottonwood east to the pole bridge is 7835 varas, equal to about	335 chains.
Thence south to mouth of Estero 9800 varas, equal to about	410 chains.
Thence west to the barrancas 7300 varas, equal to about	308 chains.
Thence north to the cottonwood tree 7800 varas, equal to about	330 chains.
A total length of	1383 chains.

According to the plat of survey, a direct line from the site of the cottonwood east to the northeast corner is about 240 chains.

Thence south and east to point marked no. 2; and thence to southeast corner of survey, is about	520 chains.
Thence westerly to barrancas is about	335 chains.
Thence northerly to cottonwood site is about	360 chains.
A total of	1455 chains.

thus showing the total distance measured by the Alcalde to be 17 miles and twenty-three chains, and the total distance from point to point as established by Hancock 18 miles and 15 chains, making a total difference between the two measurements of but 72 chains or nine tenths of a mile.

From the foregoing facts I decide that the survey under consideration containing 13,919 $^{90}/_{100}$ acres and made by U.S. Deputy Surveyor Henry Hancock in July, 1858, should be approved by this office.

You will give notice of this decision to all parties in interest and allow sixty days from the service thereof for appeal to the Hon. Sec. of the Interior, at the expiration of which time you will make the usual return.

Very respectfully,

Willis Drummond
Commissioner

Office - Supreme Court, U.S.
FILED
JUN 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-708

IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,
Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

On Writ of Certiorari to the Supreme Court of California

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED
OCTOBER 22, 1982
CERTIORARI GRANTED MARCH 21, 1983

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Opinion of the Supreme Court, May 10, 1982
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Order of the Supreme Court Denying Rehearing, June 16, 1982
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Judgment of the Supreme Court, June 17, 1982
(Reprinted at A34 of Appendix to Petition for Certiorari)

NOTE: The documents contained in this Joint Appendix are reproduced literally with all spelling, grammatical and other errors. Many of the original documents were handwritten, and portions of them were difficult to decipher.

Espediente and Grant for Rancho La Ballona

1839

Espediente

Instituted by the Citizens Agustin and Ignacio Machado, Felipe and Tomas Talamantes in their petition for a place called

Ballona

184

Sr. Prefect ad interim of this District

Agustin Machado, Felipe Talamantes Ignacio Machado and Tomas Talamantes before Y. H. with all due respect and in terms most conformable to law present ourselves and say: That it is about the space of 18 or 19 years that we have provisionally occupied with our grazing stock, houses and other interests, the place called "Pass of the Waggons" (Paso de las Carretas) but more generally known by the name of the Ballona, and wishing to secure in the best possible mode, the maintenance of our increased families, as there is no one who can better represent our rights, we beseech of Y. H. to be pleased to grant us in right of property the said place, being that which the duly accompanying diagram represents more intelligently, wherefore

Of Y. H. we humbly ask to deign to grant this our petition, expressing that of your efficient and known goodness, you will concede the favor, which we implore, for thus it is justice. We swear it necessary.

We likewise pray you will admit this on common paper for want of the sealed in this city.

Angeles Sept. 19th 1839 –

We know not how to write –
(or to sign it)
[endorsed on the same]

Angeles Sept. 20th 1839 –

Inform the Il. city council of what is contained in the petition, with citation to the adjoining land claimants.

Tapia –

Angeles 28th 1839

Account of this Espediente having been given to the Illustrious City Council of this city in session of to-day, they resolved to commit it to the committee on unoccupied land that, upon previous citation of the adjoining land-claimants, they may produce the report which is asked by the Señor Prefect.

Antonio Machado

Narciso Botello
Secretary

Illustrious City Council

The committee on unoccupied lands to examine the land referred to in the present Espediente say: That it alone is occupied with a stock of large cattle and horses and small cattle, vineyards and houses, and sowing grounds, all pertaining to the petitioners who have had possession of it for the period that they themselves express, in virtue of which the committee are of opinion that the respective possession of property may be granted; for they find no obstacle; and this is the report which they make in virtue of the marginal decree.

Ang. October 12th 1839.

Juan C. Vejar

Januario Abila

Angeles Dec. 12th 1839

Account of the preceeding report having been given to the Illustrious City Council, it is agreed that the report be granted which the Sr. Prefect asks in favor of the petitioners

Antonio Machado
Prest^e ad interim

Ignacio Coronel
Secretary

Angeles October 15th 1839

Return the present Espediente to the Illustrious City Council for the purpose that they may express whether or not they approve of the report of the respective committee, suggesting that this Prefecturate has not asked a report in favor of the petitioners, as it is expressed in the former decree

Tapia

Narciso Botello
Secretary

Angeles October 19th 1839 –

The Illustrious City Council in session of to-day approve of the decision (or report) of the committee stamped on the former petition; and with this, the mistake remains corrected which was made in the decree of the 12th inst.

Antonio Machado
Presd^t ad interim

Ign.^o Coronel
Secy

M. E. Sr. Governor:

The Prefecturate of this District having been advised of the preceeding reports, believes that it is well to grant the solicitations of the petitioners, if thus it be of the superior pleasure of Y. E. who has the qualifications necessary to be attended to, and being possessors for many years of the place which they mention.

Tiburcio Tapia

Narciso Botello
Secy

Monterey Nov. 27th 1839

Having seen the petition with which this Espediente commences, the report of the Sr. Prefect of the 2nd District, and that of the Illustrious City Council of the City of Los Angeles, with all the further steps which the present has taken, and that it all agrees, in conformity with the laws and regulations on the subject, I hereby grant to the citizens Agustin and Ignacio Machado, Felipe and Tomas Talamantes, the land known by the name of the Ballona, bounded on the West by the ranch of the citizen Policapio Higuera, on the North by that of the Citizen A. Ignacio Abila and on the South by that of the Sr. José Sepulveda, and they shall be subject to what may result concerning the bounds of the municipality of the City of Los Angeles. Issue the corresponding dispatch, take record in the proper book, the same in the Book in the Prefecturate of the Second District.

The Sr. Dn. Juan B. Alvarado, Governor Constitutionally of the Department of the Californias; thus I commanded, decreed, and signed it, which I attest.

Alvarado

Manuel Jimeno
Secretary

Seal of the First Class — Six Dollars
Qualified provisionally for the maratime Custom House for the years 1839 & 1840.

Alvarado Antonio Maria Osio

Juan B. Alvarado. Constitutional Governor of the Department of the Californias.

Whereas the Srs. Agustin & Ignacio Machado, Felipe & Tomas Talamantes, have solicited for their personal benefit and that of their families the land known by the name of the "Ballona" bordering at the East with Mr. Policapio Higuera, at the North with Mr. Alimis, at the West with Mr. Antonio Ignacio Abila and at the south with Mr. Sepulveda they having previously performed the proceedings and necessary enquiries, according to what is agreeable to the laws and regulations. Exercising the powers that are conferred upon me in name of the Mexican Nation I have resolved to grant them the land above mentioned under the conditions following:

1. That they shall be subject to the rule which ought to be adopted with respect to the determining of the boundary in the lands of the City of Los Angeles lest it should result to be comprehended in them.

2nd. They may enclose it without prejudice to the traversing roads and servitudes: they shall farm it freely and exclusively, destining it to that use or cultivation, that may most serve them

3. The respective judge shall cause the land to be measured in conformity with the regulations and shall declare the possession of it to the interested parties

4. If the land shall not be comprehended in those which the first article suggests, the parties interested may repair to the Government for a confirmation of their property.

Therefore I order that there be taken in the proper book, and be delivered to the parties interested for their protection and further ends

Given at Monterey the twenty seventh of November. One thousand eight hundred and thirty nine.

Juan B. Alvarado

Manuel Jimeno
Secretary of the despatch

Let account of this despatch be preserved in the book of entries concerning the adjudication of Public lands at page 13th

Jimeno

His Excellency the Governor has ordered that account of this despatch be taken in the prefecturate of the 2nd District.

Jimeno

Angeles December 9th 1839

Let account be taken of this Title in the proper book of this Prefecturate at page 1st by virtue of which the parties interested may repair to one of the Justices of the Peace of this City soliciting the corresponding possession.

Tapia
Narciso Botello
Secretary

Mexican Diseño (Map)

Judicial Possession of Rancho La Ballona (1839)

Señor Judge of the 2nd of the Instances

Agustin, Ignacio, Machado, Felipe and Tomas Talamantes neighbours of this Demarcation before Your Honor in all due form of Laws, say, That we respectfully enclose the title of property in the ranch called the Ballona, granted by the Superior Government —, in order that you may be well desposed to give us the corresponding possession conformably with the title or dispatch, which accompanies —

Postscript — We supplicate that you may be pleased to accede to this our solicitude, in that it may be received with favor: we take the necessary oath xc. Be pleased to admit this on common paper, for want of the proper sealed paper.

Angeles December 30th 1839.

Not knowing how to sign this we request Francisco I. Alvarado to do it for us at the city. By request of the parties interested.

Francisco I. Alvarado

Angeles December 30th 1839

Conformably to the superior decree of this Prefecturate and acceding to the request of the parties interested, let it be proceeded to give the proper possession. Thus I the judge who subscribes, decree and sign according to the law.

Manuel Domingues

Assis
Ignacio Coronel

Assis
Agustin Olivera

In the City of Los Angeles of the Department of the Californias, at the thirty first day of the month of December of One Thousand Eight Hundred and Thirty Nine. Condescending to the Petition of the Sirs Agustin and Ignacio Machado, Felipe and Tomas Talamantes and the Decree of the Prefect *ad interim* of this District, dated the 9th of the present: To the end that due possession be given them, the above named Machado and Talamantes of the site and ranch called Ballona which they have actually occupied with their chattles of the plain and other ampliations granted by His Excellency the Governor of this Department which title or original despatch they have presented to this court: Let it be passed by me and my assistant witnesses to the site before mentioned: and let it be proceeded to give the possession indicated, previous citation having been made to the adjoining neighbours, for the purpose of regulating the title referred to, which has been conferred by the Departmental Government, dated the twenty seventh of November of the present year. I, Manuel Domingues Justice of the Peace of the 2nd Instance order and subscribe with the assisting witnesses according to law, on this common paper, for want of the proper sealed paper which I attest

Manuel Domingues — Ignacio Coronel

Francisco I. Alvarado of Assistance

On the same day, month, and year I the judge who subscribes, summoned the adjoining neighbours Don Palicarpio Higuera, Don Agustin Ignacio Abila, Don Francisco Sepulveda and Don Maximo Olives explaining to them the object for which I had directed myself to the place of the Ballona, to wit: to remeasure and put in its possession the Snrs. Augustin and Ignacio Machado, Felipe and Tomas Talamantes, which fact I put down for inspection and which I authorize and sign with the assistance according to law.

Manuel Domingues

Assistance — Ass.

Ignacio Coronel — Fran.co I. Alvarado

On the same day month and year, being at the foot of a cotton-wood tree, which is at a long distance from the house where dwell the Sirs Machado and Talamantes. I appointed two official cord-bearers, one was Marcelo Rodona, and the other Policarpio Higuera, to whom I caused to be made known their appointments, which they accepted under oath which they agreed to, offering to discharge faithfully their trust, which I authorise and sign with the witnesses of my assistance according to law — Manuel Dominguez-Ignacio Coronel — Francisco Ianares Alvarado assistant cordbearer, Manuel Rodena. The other cordbearer knows not how to write.

On the same day month and year, being at the foot of a cotton wood tree at a long distance from the House where dwell the Sirs Machado and Talamantes to verify to the aforenamed persons of the place referred to — the Ballona, all the prior requisites of the law were commenced; and being in presence of my witnesses of assistance, and the official Cord-bearers I caused a cord to be measured which contained One Hundred varas, fixing to its extremities stakes of wood, after observation and calculation with an inspection of the title, by my order the cord was established from the cotton-wood tree, to which cuts of a hatchet were given, to serve for a land mark, a direction to the east were measured and counted. Seven thousand eight-hundred and thirty five varas terminating at a little pole bridge, which was fixed for a land mark, at which point was the adjoining neighbour Don Policarpio Higuera, he not having manifested any objection it was given for a perpetual measurement:

From thence the cord was stretched a direction towards the south, and were measured and counted nine thousand and eight hundred varas; which terminated at the mouth of a creek ("estero") a place which was fixed for a land mark: but when it was measured, Antonio Avila charged that this situation or place belonged to him, and having asked him for the Documents which would prove it his property, he did not present them: but

said the plat ("desino") was in Monterey for which cause it was fixed for a measurement, pursuing to stretch the cord towards the west there were measured along the sea-coast seven thousand and three hundred varas which terminated at a point called the deep Gullies ("barrancas") a situation which was fixed for a land mark.

From thence the rope was stretched in a direction towards the north, taking a course so as to strike the cotton wood tree, where the measuring was commenced, and there seven thousand and eight hundred varas, the adjoining neighbors being Sepulveda, Maccimo Alimis, the former, although he indicated that he had asked the government for a small piece of this land; but as he did not present the memorial ("Constancia") nor documents these were continued, and the measurement was given which for investigation Diligentias I set down, and which I authorize and sign with the witnesses of my assistance according to law,

Manuel Domingues

Assis Ignacio Coronel

Assis
Francisco Ianares Alvarado

It agrees with the original to which I referred which was faithfully taken, corrected and compared on five leaves of common paper, for want of the proper sealed and exists in the book of Public Instrument of the year of 1839 in evidence of the truth.

Angeles Dec. 31st 1839
Manuel Domingues

Assis
Ignacio Coronel

Assis
Vicente Sanchez

Espediente (1840)

Espediente on behalf of Messrs. Machado and Talamantes, year 1840.

To the first justice of the Peace, Agustin and Ignacio Machado, Felipe and Tomas Talamantes, state to you as best may be consistant with law: That it being subserveant to our personal interests, that the superior government explain certain doubts about the possession of our Rancho, we request that you will see fit to cause to appear in this justices court in your charge the Citizens Ricardo Bejar, Policarpio Higuera, Fran.co J. Alvarado, J. Jul. Baldes and Juan Ballestos, who will be interrogated to the tenor

1st That they say up to where the lands of the Rancho called La Ballona are comprised.

2nd How long time it is since we here occupied this site, and whether we have put thereon the necessary stock according to ordinance.

3rd That they say whether at the time of measuring the land under the juridical possession given us on 31st last, we perhaps added more land or diminished it.

This action being taken you will return us the espediente in original for purposes that may suit each of us.

Wherefore we pray that you will do as requested by us, whereby we shall receive favor, we swear xc.

You will be pleased to admit this on common paper as there is no stamped paper to be had. And as the interested parties Augustin, Ignacio, Felipe and Tomas do not know how to sign, I do so on their request.

Agustin Valverde

Angeles January 15, 1840

It having been presented and admitted in as far as is consistant with law. Let the persons named in the foregoing instance be summoned, and being formally sworn let them make declaration in accordance with the foregoing interrogatory.

Felipe Lugo, 1st Justice of the Peace and of the 1st Instance so ordered and subscribed.

Felipe Lugo

Assis Ign Coronel
Assis. Bacilio Valdez

In consequence, Ricardo Vejar, being present in person and whom I attest that I know, was sworn according to law, on which oath he promised to tell the truth about what he might know and be questioned about, and being first generally questioned, he said that his name is as above stated, that he is 33 years of age, married, a Roman Apostolic Catholic, farmer, native of San Diego and resident of this District and in accordance with the foregoing interrogation he answered,

To the 1st That about east (literally where the sun rises) from el paso de la carreta the whole opening (included) to the mouth of the Estuary, southerly from the same mouth of the Estuary along the shore of the hollows, and westerly from the hollows along all the table land to the Elm tree, and northerly from the Elm tree to the same paso de la carreta ascending above the hill.

To the 2nd. That it is 16 years since they have possessed it, and he has always seen it covered with cattle, house and corral.

To the 3rd That he is ignorant of the tenor of this question. That what he has said is the truth on the oath he has taken, which he affirmed and ratified, without adding or leaving anything, this declaration being read to him, and he did not sign as he did not know how. I Logello with my assistants did so according to law.

Erasure of "donde sale" is not valid.

Felipe Lugo

Assis
Ignacio Coronel Bacilio Valdes

In continuation, the Citizen Francisco Javier Alvarado, whom I attest that I know being previously present, he was sworn and taken in formal oath according to law, on which oath he promised to tell the truth about what he might know and be interrogated about, what he might know and be interrogated about and being questioned generally, he said his name is as above stated, that he is 33 years of age, married, a Roman Apostolic Catholic native and resident of this city, and respecting the interrogatories he answered:

To the 1st. That from el paso de la carreta for above the high hill, along all the edge of the hills to the mouth of the Estuary. Which is to east (where the sun rises) and southerly from the same mouth of the Estuary to the hollows, from the hollows to the elm tree, westerly and northerly from the Elm tree to el paso de la carreta, ascending to the hill.

To the 2nd. That according to his reccollection there will be about 18 years since he heard say this sitio de la Ballona to belong to the Machado, and that he knows they had held it with sufficient stock.

To the 3rd. That according to what he heard when he went to see the possession be given Antonio (Ignacio) Avila as bordering land owner on the eastern side first charged that they took from him land of his property; the Marchados showed him that it (arose) from a diminution of the possession they had before: but the judge, for the purpose of mediating, insisted several times in asking for the documents of A. Ignacio Avila, and as he did not present any, the Alcalde D. Manuel Domingues ordered the mensuration to be continued. The same occurred on the western side with the bordering land owner Don Franco Sepulveda, but besides that he neither

presented any document (he thinks) the Machados were stripped of something like 600 varas which remained in favor of Sepulveda the latter himself designating his old boundaries.

That what he has said is the truth on his oath, without having any thing either to add or to leave out, which he affirmed and ratified, his decleration being read to him, subscribing with me and my assistants according to law (Erasure of "poniente" is not valid.)

Felipe Lugo — Franco J. Alvarado
Ass. Ign. Coronel — Ass. Bacilio Valdez

Thereafter the Citizen Policarpio Higuera being personally present, and whom I attest that I know, was taken in oath in due legal form, on which oath he promised to tell the truth about what he might know and be interrogated about and being put the general questions he said: that his name is as above stated, that he is forty years of age, married a Roman Apostolic Catholic, a field laborer, native and resident of this city and its limits.

Respecting the interrogations he answered

To the 1st. That from the paso de la carreta, over the hill to the mouth of the Estuary that is to east, and southerly from the mouth of the Estuary to the hollows: from the hollows to the first Elm-tree, westerly and northerly from the Elm-tree to the high hill.

To the 2nd That it is about 19 years since he has seen the Machados to be in possession of the sitio called "Ballona", and he has always seen it covered with stock, buildings and farming.

To the 3rd. That as far as he knows the land as being bordering land owners towards the direction of Guicha there was cut off some five varas to the east and to the west there was cut off more than 200 varas. That what he has said is the truth on the oath he has taken, which

he affirmed and ratified without having any thing either to add or to leave out. This is his declaration being read to him and he did not sign as he did not know how.

I did so with my assistance according to law.

Assis Felipe Lugo
Ign Coronel Bacilio Valdez

In continuation, the Citizen Juan Ballona being personally present, and whom I attest that I know, he was taken in oath according to law, on which oath he promised to tell the truth about what he might know and be questioned about, and being first put the general questions he said, that his name is as above stated that he is 56 years of age, married, a Roman Apostolic Catholic, field laborer, native of S. Barbara and resident of this city, and requesting the interrogatories, he answered:

To the 1st That from el paso de la carreta to where the Estuary empties on the eastern side, and southerly from the same mouth of the Estuary along the shore to the hollows,

Westerly from the hollows up to where is an Elm tree, and northerly from the first named Elm tree to el paso de la carreta.

To the 2nd. That it is now 19 years since he knows them to be in possession of the land called La Ballona and has always been occupied with houses and country stock.

To the 3rd That he is ignorant of the tenor of the question. This he said to be the truth on his oath, which he affirmed and ratified without having any thing either to add or to leave out. This his decleration being read to him and he signed with me and my assistants according to law.

Felipe Lugo Juan Ballona
Assis Ign Coronel Felipe Catillo

Under the same date José Julian Baldes being personally present and whom I attest that I know, he was taken in oath in due legal form, on which oath he promised to tell the truth about what he might know and be interrogated about, and being first put the general questions, he said that his name is as above stated, that he is thirty years of age, married, a Roman Apostolic Catholic, a field laborer, native and resident of this city and respecting the interrogations he answered.

To the 1st That bordering on Mr. Policarpio Higuera from el paso de la carreta along the edge of Henacha to the mouth of the Estuary, and southerly from the mouth of the hollows, westerly from the hollows to the Elm-trees, and northerly to the same paso de las carretas over the hill.

To the 2nd That so long ago as he can recollect he has seen the land called La Ballona to be occupied by the Machados with habitations, corrales, and country stock.

To the 3rd That he is ignorant of the tenor of the question.

This he said to be the truth on his oath which he affirmed and ratified this his decleration being read to him and he did not sign because he did not know how: I did so together with my assistants according to law.

Felipe Lugo
Ass Ignacio Coronal
Bacilio Valdez

Angeles January 15th 1840

The testimony consequent on the foregoing interrogatories being finished and the respective action being taken let it be returned in Original to the interested parties Machados and Talamantes for such purposes as may suit them.

Thus did I Felipe Lugo 1st Justice of the Peace and of the 1st Instance order and sign together with the attesting witness, according to law:

Felipe Lugo

Assis
Ignacio Coronal

Felipe Castillo

Petition for Confirmation to the Board of Land Commissioners

To the Honorable

The United States Commissioners for the settlement of California Land Claims.

Your petitioners Agustin & Ignacio Machado, Felipe & Tomas Talamantes, residents of the County of Los Angeles & State of California, respectfully represent: that they claim as joint owners in fee-simple the ranch called "Ballona", which was granted to them, (after a peaceable and uninterrupted possession by them of 18 or 19 years under a provisional concession,) by Juan B. Alvarado, as Governor of California, and as such possessed of ample powers in the premises, by deed of grant, dated November 27th A.D. 1839, and made to them jointly and in fee simple, said ranch being bounded and described as follows:

Beginning at a Cottonwood tree, at considerable distance from the house on said Ranch, which is marked with hatchet cuts, thence running East 7.835 varas, to a little pole bridge; thence South 9.800 varas, to the mouth of a creek ("Estero") — thence West along the Sea Coast 7.300 varas, to the deep gullies ("Barrancas") thence Northerly 7.800 varas to the place of beginning; containing one league of grazing land more or less; and situated in the County and State aforesaid.

Your petitioners have held peaceable possession from the date of said grant to the present, and have fulfilled all the conditions of said deed of concession. There is no interfering claim; it has never been surveyed by the United States Surveyor for California. They will rely upon the following documentary evidence to support their claim before your Hon. Board.

1st A fac-simile copy of the Expediente and original grant marked A.

2d Copy of Judicial possession, executed by the proper municipal authority to them the 31st March, 1839, marked B.

These papers are accompanied with true translations marked 1.2: and are all filed with the Secretary of your Hon. Board. They will rely upon such further documentary evidence and parol testimony, as may serve to support their claim. And they ask that you will be pleased of your superior legal intelligence and sense of justice to confirm them in the property and possession of said claim.

and as in duly bound, &c
Agustin & Ignacio Machado
Felipe & Tomas Talamantes

By Scott & Granger
Att'ys

Oct. 2d, 1852,
Filed in Office Oct. 2, 1852
Geo. Fisher, Secy.

Decree of Confirmation, Board of Land Commissioners

Augustin Machado,	)
Ignacio Machado,	)
Felipe Talamantes and	)
Thomas Talamantes	)
vs.	)
The United States	)

In this case on hearing the proofs and allegations it is adjudged by the Commission that the claim in this case is valid, and it is therefore decreed that the same be confirmed.

The lands of which confirmation are hereby made are known by the name of "Ballona" and are bounded and described as follows to wit: Commencing at a cotton-wood tree, in which cuts of a hatchet were made, and running East seven thousand eight hundred and thirty-five varas to a little pole bridge, thence running South nine thousand and eight hundred varas to the mouth of a creek, thence along the sea coast in a Western direction seven thousand and three hundred varas, to a point called the deep gullies, thence North in a direction to strike the said cotton-wood tree, seven thousand and eight hundred varas, to the place of beginning. Reference for further description to be had to the original grant filed in this case, and to the map, which forms a part of the traced copy of the expediente marked A, and which is also filed as evidence in the case.

Alpheus Felch	)	Commissioners
Thompson Campbell	)	
R. Aug. Thompson	)	

Filed in Office Feb. 14th 1854
Geo. Fisher, Secy.

Order of Confirmation, United States District Court

United States District Court for the
Southern District of California

December Term 1855

Augustin Machado, *et al* *Appellees*	)	
	)	Case No. 123
	)	Place called
ads.	)	"Ballona"
	)	Los Angeles County
The United States *Appellants*	)	

This cause coming on to be heard at a regular Term of this Court on appeal from the final decision of the United States Board of Land Commissioners to ascertain and settle private land claims in the State of California, under an Act of Congress, approved 3d March AD 1851, on a Transcript of the decision and proceedings, and of the papers and evidence, on which such decision was founded and it appearing to the Court that said Transcript has been duly filed according to law, and counsel for the respective parties having been heard.

It is ordered, adjudged and decreed that the said decision be confirmed; and it is further ordered adjudged and decreed that the Claim of the appellees to a certain tract of land in Los Angeles County, West of the City of Los Angeles — about three leagues, and bordering on the sea shore called the "Ballona" is Valid, that said tract of land being the same now and for the last 18 or 19 years occupied by the Appellees, and bounded as follows viz.: Beginning at a Cottonwood tree at a considerable distance from the house of said Rancho, which is marked with hatchet cuts, thence running East 7835 varas to a little pole bridge thence South 9.800 varas to the mouth of a Creek (Estero) thence West along the sea coast 7.300 varas to the deep gullies (Barrancas) thence Northerly 7.800 varas to the place of beginning: refer-

ence for a more particular description being had to the grant, map and juridical possession of file in this case.

Isaac S K Ogies
US Dist. Judge

Order Vacating Order of Appeal, United States District Court

In the District Court of the United States for
the Southern District of California
Before the Hon'ble Isaac S. K. Ogies

December Term A.D. 1856

Augustin Machado *et al*
ads
The United States

No. 123
Trans. 369
"Ballona"

Upon reading the Stipulation of the Attorneys of the parties, in the above entitled cause, this day filed in Court.

It is ordered, adjudged and decreed by the Court that the order granting the appeal to the Supreme Court, be revoked, and that the decree of Confirmation heretofore made by this Court in the said cause, to wit on the 19th day of December AD 1855, be and the same is now hereby made final.

Isaac S. K. Ogies
U.S. Dist. Judge

United States America
State of California } ss.
Southern District California

I, C. Sims clk of the United States District Court for

the Southern District of California, hereby Certify the foregoing to be a full true and correct copy of the original as the same appears of file and record in my office.

In witness whereof I hereto set my hand and affix the seal of said Court this 8th April AD. 1857

C. Sims clk

by J H Coleman dep

No. 123

U.S. District Court for Southern District Cal[a]

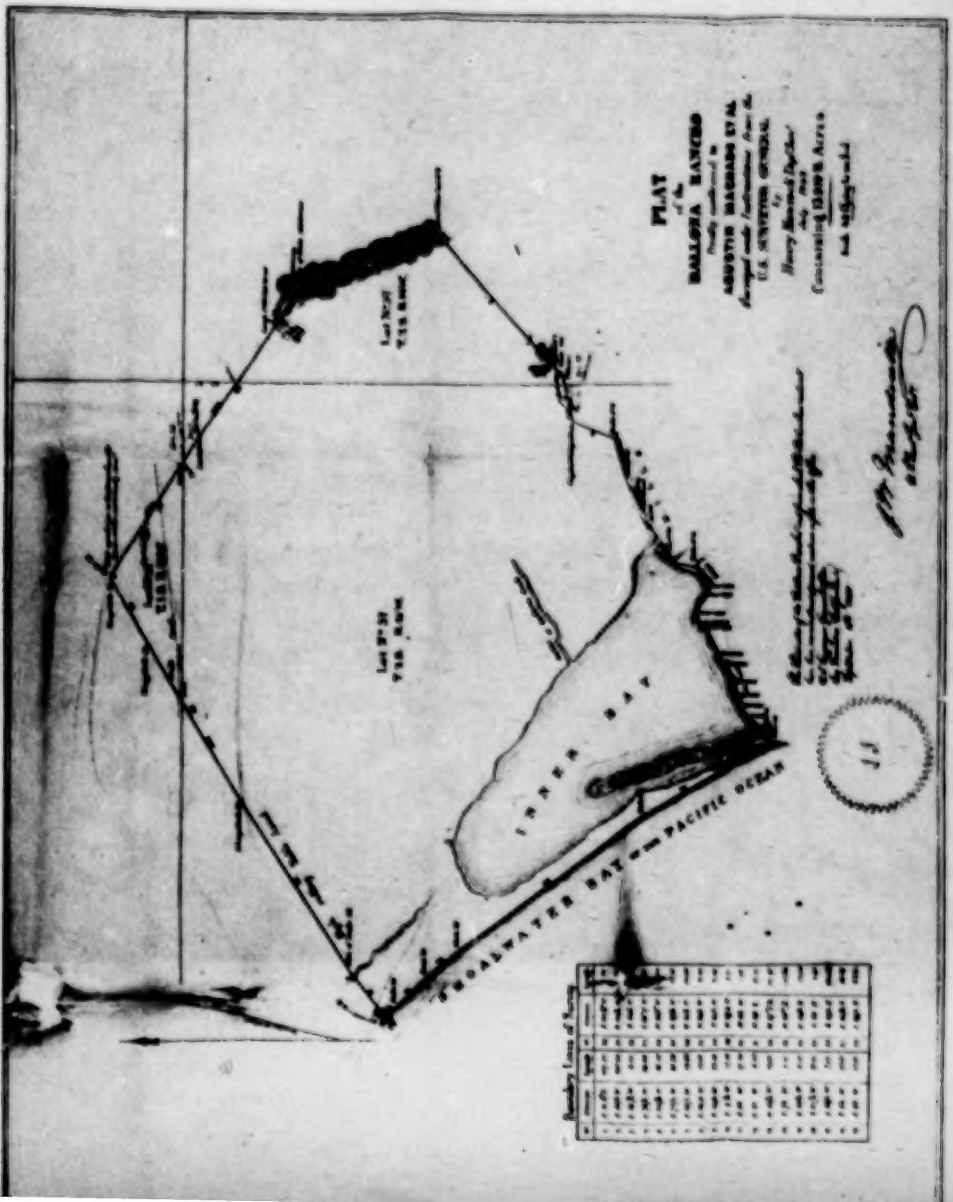
AUGUSTIN MACHADO *et al*
Appellees

ads

THE UNITED STATES
Apptts

Order to vacate order of Appeal
Filed 28 January 1857
Certified Copy
Filed April 17th 1857
U.S. Sur. Genl.

Plat of Survey of Rancho La Ballona, July 1858



Field Notes of Survey of Rancho La Ballona, Surveyed by Henry Hancock, Deputy Surveyor, July 1858

Beginning at a pile of rubble rocks, each some nine inches in diameter on a high conical hill being the North Western terminus of a range of hills on the East.

Thence according to the true meridian the variation of the magnetic needle being thirteen degrees thirty minutes East, South twenty one degrees fifteen minutes East, ascending the ridge eighty chains to the top, and along the same one hundred and seven chains, and twenty one links to a sandstone rock twenty one inches in diameter, and two small rocks Station.

Thence South, forty eight degrees, thirty minutes West, one hundred chains to the base of hills One hundred and eight chains to the base of a spur from the East, One hundred and twenty five chains to a stake on a spur from the North East, about four chains South of a lake of water, some fifteen chains long and five chains wide Station.

Thence South twenty three degrees forty five minutes West. At one chain and fifty links crosses a road course East, Four chains to a stake Station.

Thence South Seventy six degrees, thirty minutes West. At three chains enters the mouth of a Cañada, from the North East. At three chains and fifty links crosses a stream, fourteen links wide course South eight chains and eight links to a stake and charred stake at intersection with the East boundary of Township Two South, Range Fifteen West, eleven chains and fifty links North of quarter Section corner on the East boundary of Section Twenty four, Twenty five chains across a Cañada to the North base of hills. Thirty four chains and eight links to a large rock, the original corner and Station.

Thence South, twenty four degrees forty five minutes West, thirty two chains to a stake on the North West base of hills Station.

Thence South, seventy two degrees, thirty minutes West along the base of hills thirty two chains and thirty three links to a stake Station.

Thence South sixty six degrees thirty minutes West, along the North base of hills nineteen chains and sixty two links to a stake at the North East corner of a decayed corral, Station.

Thence South, sixty-four degrees fifteen minutes West, nineteen chains and fifty links to a stake at base of hills Station.

Thence South fifty four degrees, thirty minutes West, five chains to a point opposite the South East head of a Bay, twenty three chains to a stake on the West base of the hills, thirty links East of the Bay Station from which the average bearing of the North East shore of the Bay is about North West and at one hundred chains the Ballona Creek discharges itself into the Bay.

Thence South, nine degrees forty five minutes West, seventeen chains to a stake on the East base of hills six chains from the East shore of the Lake Station.

Thence South fifty three degrees West seventeen chains and thirty three links to a stake eight links East of the Bay shore at the North base of hills Station.

Thence North eighty one degrees West six chains to a stake sixty links South of the Bay shore Station.

Thence North fifty two degrees forty five minutes West fourteen chains and fifty links to a stake on the shore of the Bay Station.

Thence South seventy three degrees West eight chains to a stake Station.

Thence South, twenty eight degrees, forty five minutes West five chains to a stake fifty links from the shore of the Bay Station.

Thence South sixty degrees forty five minutes West twenty one chains to a stake Station.

Thence South eighty two degrees, thirty minutes West, seven chains to a stake on the North base of high hills, Station from which a pass in sand hills bears North eighty eight degrees forty five minutes West.

Thence South, fifty two degrees West, fifteen chains to a stake at North base of high hills Station.

Then South, eighty two degrees West ten chains to a stake at the edge of Bay Station.

Thence South, sixty degrees forty five minutes West eight chains to a stake at the North Base of high hills, and on the shore of Bay Station.

Thence South, fifty degrees, forty five minutes West nine chains to a stake Station.

Thence South forty three degrees, fifteen minutes West, at eleven chains and fifty links leaves the shore of the Bay and enters sand hills eight and ten chains wide extending far to the North West. Nineteen chains and fifty links to a stake Station at the East shore of the inlet from which the East shore of the inlet ranges North twenty degrees West. The Inlet for about one hundred and thirty chains is from eight to ten chains wide.

Thence South, forty five degrees nine minutes West eight chains and twenty one links to a stake and charred stake Station on the West shore of the Inlet.

Thence North, twenty five degrees, thirty minutes West forty three chains to a stake at high water mark on shore-water Bay of the Pacific Ocean Station.

Thence North, twenty nine degrees forty five minutes West sixty five chains to a stake at high water mark Station.

Thence North, thirty five degrees thirty minutes West one hundred and sixty chains to a stake at high water mark Station.

Thence North, thirty nine degrees thirty minutes West thirty chains to a stake Station.

Thence North forty one degrees thirty minutes West thirty chains to a stake at high water mark Station.

Thence North, thirty seven degrees fifteen minutes West six chains to a stake at high water mark Station.

Thence North, sixty two degrees West one chain & fifty six links to a post opposite the mouth of the first barranca or gully being the North West corner of this Rancho and Station.

Thence North, forty nine degrees East two chains of a base of Southerly side of the barranca within an average of one chain wide and the banks about thirty feet high coming from the North thirty eight chains to a stake in 'a pile' of rocks, on the high rolling table land extending South East for the distance of about one mile and terminating in low table land bordering on the Ballona Bay which Bay has its terminus at a distance of about one hundred chains South East from this point. Station.

Thence North fifty seven degrees, one minute East one hundred and forty two chains and ninety one links to four large rocks Station.

Thence North fifty nine degrees East eighty chains and twenty four links to a point at intersection with the South boundary of Section thirty four in Township One South of Range Fifteen West nineteen chains and ninety three links West of the quarter Section corner eighty two chains and fifty links to a road course West one hundred and twenty six chains and sixty four links to three large rocks each fifteen inches in diameter Station.

Thence North fifty nine degrees and thirty minutes East fifty two chains to three rocks each eighteen inches in diameter Station.

Thence North sixty three degrees East two chains and forty one links to a stake being the most Northerly corner of this Rancho and Station from which a willow tree twenty four inches in diameter bears South eighty degrees East distant three hundred and thirty two links, (being a point agreed upon as the point where the Alamo or cottonwood tree formerly stood).

Thence South fifty seven degrees thirty minutes East thirty nine chains opposite to and two chains East of a

dry bed of a Lake ten chains from East to West and three chains from North to South Forty four chains and fifty links to a point cutting the South East corner of the lake. At sixty two chains and fifty links crosses a road course East ninety chains to the center of a ravine, thirty feet deep, ninety six chains to a stake and charred stake at intersection with the South boundary of Section thirty six in Township one South of Range Fifteen West twelve chains and fifty eight links West of quarter Section corner one hundred and thirteen chains and fifty six links to a stake and charred stake one hundred and fifty links North of a bunch of Turas Station.

Thence South fifty four degrees forty five minutes East forty five chains and seventy nine links to a stake and charred stake at intersection with the West boundary of Township Two South of Range Fourteen West thirty six chains and seventy five links South of the North West corner of said Township Eighty six chains and fifty nine links to a rock two and one half feet long eighteen inches wide, and twelve inches thick imbedded in the earth being an original corner Station and

Thence South, fifty nine degrees thirty minutes East, nine chains and fifty links to timber: At eleven chains and fifty links crosses a stream of water eighteen links wide, skirted with sycamore trees, course South West. At eighteen chains and fifty links crosses a road course South West to base of hills some three hundred feet high and leaves timber Thirty eight chains and eighty one links to the place of beginning containing Thirteen thousand nine hundred and nineteen acres and ninety hundredths of an acre, and being designated upon the Plats of the Public Surveys as lot numbered Thirty seven in Township One South of Range Fifteen West: Lot numbered Thirty seven in Township Two South of Range Fourteen West: and Lot numbered Thirty seven in Township Two South of Range Fifteen West of the San Bernardino Meridian.

Letter from Joseph S. Wilson

J. W. Mandeville, Esq.
U.S. Surveyor General
San Francisco, Cala.

General Land Office
March 17, 1860

Sir:

The survey of the "Ballona" Rancho finally confirmed to Augustin Machado, et al is not approved.

Our objections to the survey are fully set forth in the following:

The confirmation is by boundaries. Beginning at a Cottonwood tree, running East 7835 varas, to a pole bridge, thence South 9800 varas to mouth of a creek (Estero) thence West along the Sea Coast 7300 varas to the deep gullies (Barrancas) thence Northerly 7800 varas to the place of beginning.

The survey returned is for 13,919 $^{99}/_{100}$ acres. A survey according to the courses and distances mentioned would not enclose that quantity by perhaps 2,000 acres. The plat shows however a large body of water called "Inner Bay" some three miles long by one wide, which is included in this area. There is no mention made of quantity in the grant or decree. When the Claimant comes to petition the Board, he describes the grant by its boundaries as above, and adds "containing one league of grazing land more or less." This is understood however to refer to the quantity of land of a particular character, that is "grazing" land within the Rancho. And this view is sustained by the Map (Diseño) on which about one third of the tract is shaded green and marked "Tierras de Siembra" (cultivated lands) the residue being marked "Lomas Muertas" (barren hills). The grant and juridical possession referred to throw no further light upon the matter; the courses and distances being those of the decree. The Diseño bears a strong resemblance in form to the Survey, but that remarkable feature in the latter, the Inner Bay, is not shown on the former. A prominent natural object on the Diseño is a creek, name illegible, running Southerly through the Eastern part of the Rancho, and emptying

into a body of Water, designated "Playa" (coast or shore) which makes a boundary on one side of the Rancho.

The only creek found on the survey is one called "Ballona Creek" — doubtless the same above referred to. It empties into the "Inner Bay" not far from the South East corner of the Claim and from the Diseño it is plain that the body of water, into which this creek falls, is the boundary of the Rancho on that side. It is the only "Playa" found on the map and there is but one stream laid down. There would then appear to be no authority for embracing this Bay in the survey.

Had such an object existed within the grant, it could not have been overlooked or neglected in sketching the Diseño, nor have escaped notice and mention in the juridical possession. Again — the Diseño is drawn with some care, and the points of the Compass are designated thereon in the usual manner, and with tolerable accuracy, allowing for the variation of the Compass which is 13° 30′ East. It shows the North boundary a due East line. From the survey it appears that the place where the "Cottonwood" (place of beginning, see decree & c) formerly stood, was ascertained and agreed upon. That found, the survey should have run East therefrom (or at least the variation from that course should not have been greater than the ascertained variation of the Compass) 7835 varas — thence Southerly 9800 varas to a point on the shore (see diseño) a little East, of the mouth of the creek (Ballona). Thence along the coast (Playa) of the Inner Bay 7300 varas to the gullies (Barrancas) which will probably be found at the North end of this Bay — thence to the place of beginning.

How runs the Survey?

In the North East boundary, (which answers to the North of the decree) from the "Cottonwood" to the "Sand Stone Rock No. 2" there is an average departure of about 40° from an East course, treble the variation. Hence when the next line comes to be run, the South course for 9800 varas cannot be had without running to the Pacific coast, South of Inner Bay. But let the first line be run

from the "Cottonwood" (and this it is presumed should have been the point of beginning) East, or at least not more than 13° 30′ South of East, the distance called for of 7835 varas or about 326 chains, and we can then run from the point thus reached, 9800 varas before the Shore (Playa) of the Inner Bay is reached. Thence following that shore North West (West by the decree) to its Northern extremity and thence Northerly to the Cottonwood, and it is believed that the tract granted would be embraced within the lines, and a survey presented in accordance with the grant and decree.

The case is remanded for re-examination and unless good cause be shown to the contrary after notice to all concerned, for amendment of the survey, in conformity to the views of this Office as set forth in the foregoing.

Very respectfully

Your Obt. Servt.

Jos. S. Wilson
Commissioner

Letter from Henry Beard

Henry Beard,
Attorney-at-Law and Solicitor of Claims
and Land Patents,

(Gives special attention to procuring patents for mining claims, and upon all kinds of land entries and locations, and argues contested cases.)
Office, No. Street. P. O. Box 745.

Washington, D.C. Oct. 14th 1868

Hon O. H. Browning,
Secretary of the Interior,

Sir;

The question of a readvertisement in the matter of the survey of the Ballona Rancho, has been submitted to you in such a manner by the Comr. of the Genl. Land Office, that I deem it necessary, to prevent any misapprehension, to say, that I understand that the original grantees are now upon the tract, and have lived there for twenty eight years: — That they are, and have been able and willing to furnish all explanations called for by the Genl. Land Office in 1860: — That they made known that fact verbally or in writing to Surveyor General Mandeville, but about that time the Act of Congress of 14th June 1860 was passed, & it was regarded, at that time by Judge Hoffman, & by the Surveyor General, as requiring this survey to be advertised — It was accordingly advertised the length of time mentioned in that law, and return of that advertisement made, but no action was taken while that law was in force, by the Dist. Court or the Comr. of the Genl. Land Office.

No objection was ever made to this survey by any one except the Commissioner. We propose to reply to his objections, which will be fairly '*in limine*,' when the Survey is advertised under the act of 1864.

Should you direct the case to proceed under the act of 3rd March 1851, without any reference to subsequent laws, or be of the opinion that the advertisement made prior to the act of July 4th 1864, may be treated as a compliance with that law, my clients are ready to tender

proof by affidavits or otherwise, to meet the objections mentioned in the Land Office letter of March 1860, and would, I believe, be able to show that some of them are now met and satisfied, by evidence already in the case, identifying the surveyed boundaries as those fixed by the Mexican Government, & by the Juridical possession, and by continuous possession since that time.

I have the honor to be

Very Respectfully,

Your Obt. Srvt.

Henry Beard
Atty.

Letter from O. H. Browning

Department of the Interior

Washington, D.C. 19th Nov. 1868

Sir,

I have received your letter of the 9th ultimo, submitting the question whether the Surveyor-General of California shall be instructed to publish the Survey of the rancho "Ballona", Agustin Machado et al. confirmees, in accordance with Sections 1 and 2 of the act of 1 July 1864 (13 Stat 332).

Said survey was approved by the Surveyor General of California on the 18th September 1858, and two days afterwards was forwarded to your office as the basis for patent. Inasmuch as the Survey has not been approved either by the proper district court of the United States for California or by your office, I am of opinion that it comes within the act of 1864, and that instructions should be issued accordingly.

The papers are herewith returned.

I am, Sir,

Very respectfully,

Your ob't servant

O. H. Browning
Secretary

Hon. Joseph S. Wilson,
Comm'r of the Gen. Land Office.

Letter from Joseph S. Wilson

Department of the Interior
General Land Office
November 30, 1868

Sherman Day, Esq.
U.S. Surveyor General
San Francisco, Cal.

Sir:

For your information and guidance I enclose herewith a copy of the ruling of the Department dated 19th inst. in the case of the rancho "Ballona" Agustin Machado et al. confirmees — to the effect that the survey of said rancho, approved by the Sur. Genl. *18th September 1858* requires to be published in accordance with the 1st & 2nd Sections of the Act of 1st July, 1864, if said survey has not been acted upon judicially the fact in regard to which you will certify to this office — and if it has not been so acted upon, you will proceed to carry out the requirements of the law in respect to publication and after the statutory period for objections has expired you will make the usual return with your opinion, having special reference to the points of objection presented in the communication from this office dated — 17th March, 1860. — a copy of which is herewith enclosed.

Please acknowledge the receipt of this.

Very respectfully

Your ob't. servt.

Jos. S. Wilson
Commissioner

The plat, certificate, & field notes are returned to be again forwarded with your report.

J.S.W.

Protest Against Survey of Rancho La Ballona and Exhibits

Protest against the published Survey of the Rancho "Ballona" confirmed to Augustin Machardo et al in land case no. 369. Land Comn.

Salisbury Haley and Jose Delores Sepulveda owners of the lands in the Rancho "San Vicente y Santa Monica" finally confirmed to Ramona Serrano Sepulveda in land Case No. 457. Land Commission, present and file the following Bill of Exceptions against the published Survey of "Ballona" Rancho in this County, for the following reasons, to wit—

Exceptions First

The Survey is Erroneous. Because it embraces a large portion or tract of land in the adjoining Rancho of "San Vicente y Santa Monica" the property of claimants under this Protest.

Exception Second

The Survey is Erroneous. Because it is not made in accordance with the Decree of Confirmation — in this — That the Decree of Confirmation refers to the Evidence in the Case — to wit — The petition for the land describing it; the Deseno deliniating the land; the grant with the description of the land; and the Judicial possession, containing the measurement of the boundary lines, or by metes and bounds, to wit — Beginning at the Alamo Tree or Laguno de Alamo and running East 7835 varas; thence South 9800 varas to mouth of a Creek (now in the Sausal Redondo); Thence West along the Sea Beach 7300 varas to the *Deep Gullies;* Thence North 7800 varas so as to strike the point of beginning

Exception Third

The Survey is Erroneous. Because its West line is made to run South West to the Ocean, a long distance West of the Deep Gullies, the defined land mark, making an Angle which embraces a large tract of the land of the Rancho "San Vicente y Santa Monica" as will appear by the Sketch Map of San Vicente y Santa Monica hereto

annexed, describing Deep Gullies, as, Mojonera I°; and Loma Colorado, as, Mojonera 2ª; and Laguna del Alamo or Cotton Wood Tree, the initial point of the Survey in the Judicial possession of said "Ballona" in the year 1839.

All of said Exceptions are respectfully submitted to the Consideration of the Hon. U.States Surveyor General for California, to enable him to correct the Errors existing in said Survey.

Salisbury Haley for himself and
Atty for J. D. Sepulveda

List of Exhibits Annexed

Exhibit (A.) Sketch of San Vicente y Sta Mn —
" (B.) Deposition of S. A. Carrillo in Land Comm.
" (C.) Affidavit of S. Haley & J. D. Sepulveda
" (D.) Decree of Govn. Pio Pico in 1846.
" (E.) Testimony of S. A. Carrillo in 1839 —
" (F.) Deed from Conference to Haley et al

Argument

These Exceptions are presented and filed by the owners of the adjoining Rancho of "San Vicente y Santa Monica" complaining of the Survey of "Ballona" on the grounds that it laps over upon this Rancho and Embraces a large tract of their land

First. The Grant for "Ballona" was made in 1839, and to bound, on the West side, by the Rancho "San Vicente y Santa Monica", which was, a long time anterior to the former, in the legal possession of Fran.co Sepulveda, with defined boundaries, and on the East side, they are marked with a series of natural objects that cannot be mistaken by a Surveyor. These natural objects, along the Ballona line, are delineated on the Sketch Map annexed as — "Deep Gullies" — Mojonera I° — Loma Colorado — Mojonera 2ª — Laguna de Alamo, as the Cotton Wood tree — This Cotton Wood tree is the initial point in the measurement of the Judicial possession of Ballona in 1839 — running East from this point 7835

varas; thence South 9800; thence 7300 varas West to Deep Gullies, Mojonera I°. As the South line of this measurement is shorter than the North line. The "San Vicente y Santa Monica" consistently ought not to be encroached upon, therefore a Correction of said Survey is sought, in that the Ballona will receive its proper lands and no more.

Brief

First. A Judicial Survey is a legal determination as to boundaries it bound the former Government and becomes Equally binding upon the officers of our Govt.

U.S. v. Pico 5. Wallace

Second

A Confirmation may be void in part or whole, and when void in either, a legal survey cannot be made under it

Higuera v United States
5 Wallace. 833

Third

Confirmation in this case was made by the Warner, and afterwards by the Pio Pico. Maps hereto annexed, which became the descriptive part of the Confirmation.

Higuera v U.S. 5 Wallace
Cal Rep. 24th, 444.

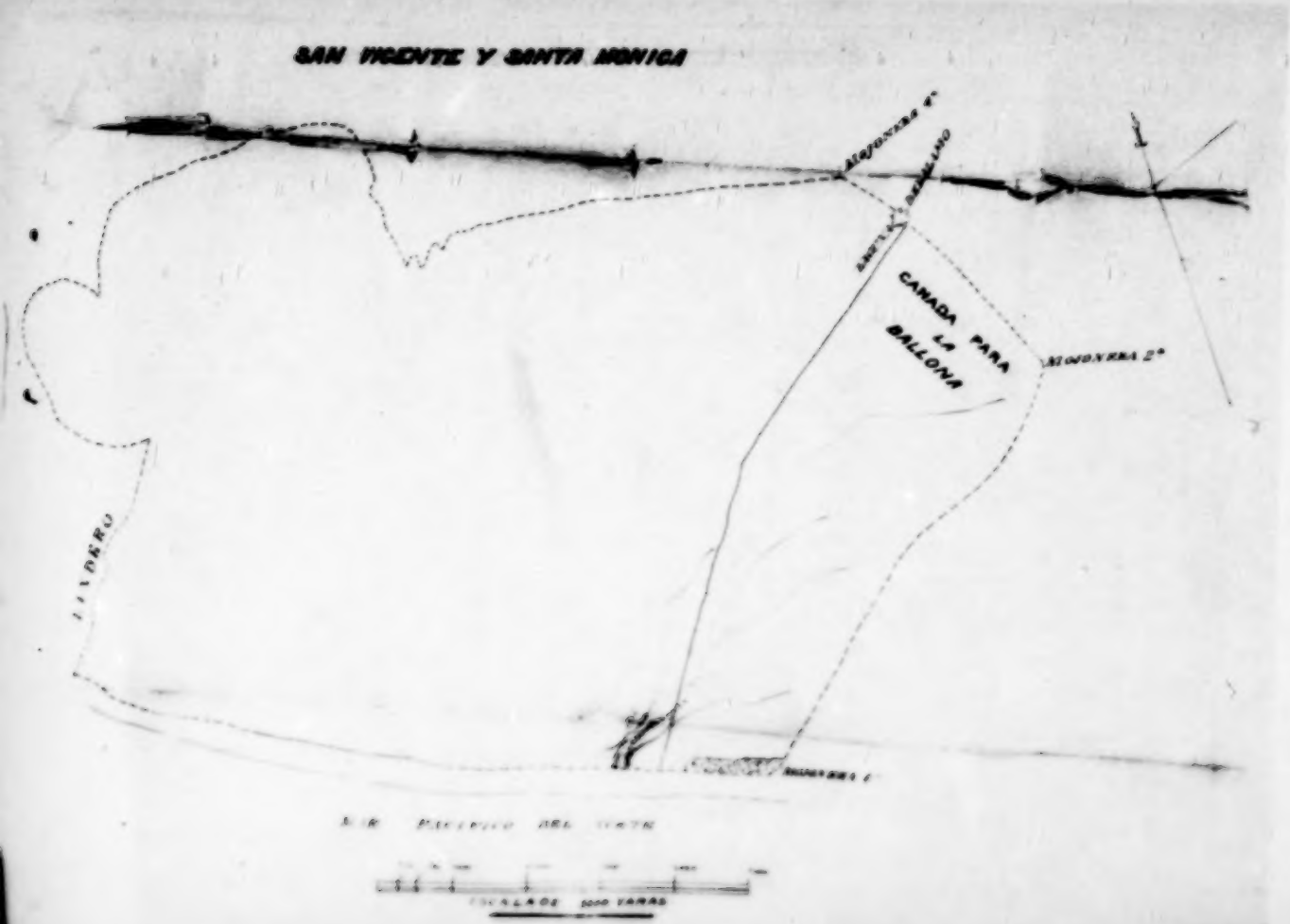

SAN VICENTE Y SANTA MONICA
Mojonera 4°
Mojonera 3°
CAÑADA PARA LA BALLONA
Mojonera 2°
LADERO

Exhibit B.

Copy of the deposition of Jose Antonio Carrillo before Hiland Hall — Court —

Los Angeles November 11th 1852

On this day, before me Hiland Hall, came Jose Antonio Carrillo, a witness in behalf of the claimant, Francisco Sepulveda, petition No. 457, and was duly sworn, his evidence being interpreted by the Secretary.

The United States Law Agent was present

In answer to these questions by counsel for the claimant, witness testified as follows:

My name is Jose Antonio Carrillo, my age is fifty seven years. I reside in Los Angeles;

I am acquainted with the Rancho called San Vicente; I have known it ever since the year 1828. It was then in the possession of Francisco Sepulveda, and he has continued in the possession of it to the present time The boundary lines were marked to him by myself in 1828. I was then Alcalde, and in consequence of some disputes between persons occupying land within the Ejidas I received an order from the Political Chief to go and settle the disputes. I did so, and at that time marked out the boundaries of this land.

They were occupying the lands provisionally. The boundaries were as follows: Beginning at the house of the Rancho San Vicente and going East to a Canada of woods called "Canada de las Alanis, near in the house or Rancho Alanis; thence Southerly passing over some table lands, and a dry laguna called de las Alamas in the lands of the Rancho "Ballona"; thence in a direct line to the Sea Coast, thence to the Potrero de Santa Monica or Topango; thence to the highest point on the Sierra; thence along the summit of the Sierra to its termination in the Canada at the place of beginning including the whole of the Potrero de Santa Monica within these boundaries; There is a Creek called Santa Monica, and the Canada is on each side of it and terminates near the

mouth of the Creek, and near the Coast; The line along the Coast passes beyond the mouth of the Creek, the tract includes the whole of the Canada; Since the boundaries were marked as before stated the said Sepulveda has occupied the whole of the land, having houses a vinyard, and cultivating the land extensively, and by keeping stock on it; The Potrero de Santa Monica has always been reputed to be a part of the Rancho San Vicente.

Jose Antonio Carillo

Sworn to & Subscribed
before me Hiland Hall
Comr.

U.S. Surveyor Genl. certifies this testimony taken before the Land Commission in the claim of Franco Sepulveda for Rancho San Vicente y Santa Monica, filed Nov 11, 1852

Signed by S. Upson

State of California }
County of Los Angeles }

Salisbury Haley and Jose Dolores Sepulveda being duly sworn on their each depose and say that they are the owners of that tract of land of the Rancho "San Vicente y Santa Monica" confirmed to Ramona Serrano Sepulveda in said Case No. 457. Land Comn. that said Rancho adjoins the Ballona on the west side; that affiants are well acquainted with all the boundary lines of said Rancho as surveyed and marked out by Alcalde Jose S. Carrillo in the year 1828, and as is contained in the delineations upon the map, hereto annexed, by which final Confirmation was made by the United States Dist. Court; that the East-boundary line of such Rancho embraced the following known objects to wit the Canada de Mangles, the Arroyo Alanis-seca, the Leguna de Alamo, the table land to the Loma Colorado, thence in a direct line in the Deep Gullies at the sea beach near the Estuary of the Ballona, and that the present published Survey of Ballona em-

braced a large tract of Affiants land, a part of the Rancho "San Vicente y Santa Monica".

Said affiants complaining of the Survey of the said Ballona-say that the same is erroneous, because it does not respect the affiants rights of property in the adjoining Rancho, and includes therein a large tract of their land of San Vicente y Santa Monica

Salisbury Haley
Jose Dolores Sepulveda

Subscribed and sworn to before me
this 3rd day of May 1869
Thomas D. Mott
County Clerk
By F. N. Gillette Deputy

Exhibit D

Copy of Decree by Pio Pico
for Sobrante Grant 1846,

Los Angeles June 8th 1846

There remains a piece of vacant land in the place where the citizens Francisco Sepulveda, Augustin Machardo, Isidro Reyes, Francisco Marques and Maximo Alanis have in dispute the revalidating his Concession is not made to prejudice third parties, as appears by the testimony already taken, in Conformity with the law of the 18th August 1824, and the regulations of the 21st November 1828, in the use of the faculties with which I find myself authorised in the name of the Mexican Nation, I have determined by these present documents in conceding to Don Francisco Sepulveda the said piece of Sobrante Land in the Ranch in question with the above named persons, exactly as is described in the "Map"— contained in the Expediente prepared to explain this question, leaving him with his legal rights herein determined so that he will have his remedy at the installation of the Superior tribunal of justice. Consequently let the respective title issue to him, and reserve the Expediente to be submitted for the approval of the Excellent Departmental Assembly.

Pio Pico Constitutional Governor of the Department of the Californias Order decree and sign, I certify it.

Jose Matias Moreno
Secy. int.

Exhibit E

Copy of the testimony of Jose A. Carrillo, taken before the 1st Alcalde in Los Angeles in the Year 1839, touching the grant made to F. Sepulveda for "San Vicente y Santa Monica" by Gov. J. M. Echeandia and the judicial survey made by said Carrillo in presence of Machardo, Talamantes, Ruis and others in the year 1828.

Jose Anto. Carrillo, personally known to me, doth solemnly swear upon his oath and — says — that he will truly answer all the questions put to him touching the following interrogatories.

Question? What is your name, Age, State, religion and nativity?

Answear: I am 43 years old, a widower, a Roman Catholic, born at the Port of San Francisco and live in this City.

1st Respecting the First question in the interrogatories, this Deponent says — That in the Year 1828, he was Alcalde, and received an Order from Don Jose Maria Echeandia "Political Chief" at that time, in consequence of a reclamation from various neighbors upon the outside lands of this City to be given possession provisionally of the lands they occupy, accordingly. I gave Don Fran.co Sepulveda possession of the place called San Vicente with a piece of protrero called Santa Monica; this Order was confined to those who had 150 head of horned cattle. Mr. Sepulveda knowing this condition, procured An Order to have granted to him the said place with the addition of the Potrero de Santa Monica by virtue of said Order this deponent gave him the Possession thereof in the presence of Felipe Talamantes, Augustin Machardo, Anastasia Abila, Joaquin Ruis and

others whose names he doesn't recollect. By this Act of possession and the above mentioned order he has been considered the owner of said land ever since.

2d He says — having said enough in the first instance respecting the possession, that he does well remember the boundary lines as marked out at that time, but remembers that on the West side the land was marked out as far as the Conclusion of the Potrero of Santa Monica: And On the East side as far as the Canada of Mangles; Also he knows from that time Sepulveda occupied the place with all classes of cattle, he knows the facts at that as Alcalde.

And the whole Ranch has been in his possession as he has had houses and farms thereon; that what is here said he affirms and ratifies as true without adding or retracting anything therefrom after the reading the affidavit to him; not being precluded by law this is signed in my presence with those of my assisting witnesses interlined horned cattle.

Man. Domingues
Ig. Coronel

Jose Antonio Carrillo
Fran.co Ma. Alvarado

F

This Indenture made the 7th day of September in the year of the Lord One Thousand Eight hundred and Sixty Eight

Between Ramona Serrano Sepulveda in the County of Los Angeles State of California party of the First part and Jose Dolores Sepulveda and Salisbury Haley both of the same place parties of the second part. Witnesseth that the said party of the first part, for and in consideration of the sum of three hundred dollars lawful money of the United States of America to her in hand paid by the said party of the second part, at or before the unsealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised released and quit-claimed, and by these presents, does remise release and quit-claim unto the said parties of the second part all that tract of land or Rancho known by the name of

San Vicente and Santa Monica granted to Francisco Sepulveda in the year 1828 by Mr. Echeandia, and re-granted the 20th day of December 1839 by Governor Alvarado and affirmed on the 8th day of June 1846 by Governor Pio Pico and Confirmed by the United States Authorities in said Sepulveda and his heirs; said Rancho is situated in the County and State aforesaid and bounded on the West and North by Malagar and the Sierra; on the West and South by the Pacific Ocean; and on the East by the Fire hill, the Laguna de Alamos and the Arroyo Seca; Excepting and reserving from the operation of this Conveyance the land conveyed by metes and bounds to Carmen Sepulveda by Deed dated July 1st 1863. & Recorded in Book No. 6, page 293, of the Los Angeles County Records, and Conveyed to Jose Dolores Sepulveda by Deed dated August 1st by metes & bounds, 1863, and recorded in Book No. 8 page 353, in said County Records office, and Conveyed to Joaquin Sepulveda & others by Deed dated January 29th 1868 for the Potrero of Santa Monica lying West of Arroyo Santa Monica and recorded in said County Recorders office in Book 9, page 245. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging it in any wise appurtaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the Estate right, title interest, property possession, claim and demand whatsoever as well in law as in equity of the said party of the first part, of, in and to the above described premises and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises together with the appurtenances unto the said parties of the second part, their heirs and assigns forever. And on the ninth line the word trust and interlined before signing.

In Witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

her
Ramona Serrano X Sepulveda
mark

Signed sealed and delivered in presence of George D. Fisher

the termination — ed — and the word August erased before signing

Contestants' Brief on Exceptions to Survey of Rancho La Ballona, January 4, 1870

Brief

In the matter of Exceptions by S. Haley & others, to the Survey by the United States Surveyor general for California of the "Ballona" Rancho S. Haley & J. D. Sepulveda excepts to said Survey of Ballona, and ask that the same may be corrected on the following grounds.

1st The Survey violates the grant of cession to Machardo & Talamantes of Ballona, and the segregation made by the petition, Deseno, grant & judicial possession of said Ballona

2nd The Survey violates the Decree of final confirmation

3rd The Survey violates the rights of property in the adjoining Ranch of San Vicente y Santa Monica, the property of Contestants and embraces a large tract of their land outside of the limits of the grant to Ballona as is described by the petition, the Deseno, the Grant, the Evidence in the Case No. 369, and the measurement by varas at the time of giving judicial possession, and in open violation of the laws governing surveys of private land claims. approved March 3, 1851 and July 1st, 1864

I

The Decree in this case refers to the Grant, Map, judicial possession and evidence on file, which are made a part of the Decree of Confirmation for the purpose of description, and are as much a part of it, as though mentioned specifically in the Decree itself, in which the validity of the grant is recognised and the mention of the specific land granted according to the description in the documents referred to in said Decree; neither the government nor grantees could ever assert any rights against such segregated boundaries as are described by the Decree of Confirmation herein; 14 Cal 550; 1 Wallace 439 —

Judicial possession in this case accurately described the boundaries and extent of the lands granted, and was conclusive on both parties; The Survey must follow said judicial possession 1st Wallace 439 — 5 Wallace p 540, 4 Wallace 259 —

This grant was made by Metes & bounds, or by the lines of the other ranches encircling it, and in order to determine the boundaries and segregate the lands granted to "Ballona" measurement was made at the time of delivery of judicial possession, that proceeding removed all doubt of the locality of the land granted, it became a judicial determination, and binding on the government in making the survey by virtue of confirmation, though in law, it is only a resurvey under our system 5 Wallace 539, 24 Cal 644, 33 Cal 448, 4 Wallace 260 1 Wallace 107, 5 Wallace 540, 4 Wallace 259 —

The Decree of Confirmation in giving boundaries must prevail as the law of the case, 5 Wallace 834

The Decree of Confirmation is a finality, both as to title and as to boundaries which it specifies, if erroneous, in either particular, the remedy was by appeal, the appeal having been withdrawn, it is closed forever, 2 Wallace 448.

The United States Surveyor-general must follow the boundaries designated in the Decree of Confirmation in making the survey, either according to the expressions in the Decree, or according to the designations in the documents referred to for description, as in this case, where the Deseno and judicial possession must control the survey, and they agreeing there is no conflict of description by which a wrong determination might be made 1 Wallace 439 —

The Decree of final confirmation adopting the map as descriptive of the boundary is conclusive of the question, especially when the judicial possession exactly corresponds with the designations of the Map, showing without conflict the boundaries of the land granted to "Ballona" which the Surveyor general must resurvey in Exact Conformity to the Survey made by the former

Government — to wit — Beginning on the margin of Laguna del Alamo, running East 7835 varas to pole bridge; thence South 9.800 varas to the mouth of a Creek; thence along the sea beach 7300 varas in the Deep Gullies (Barrancas); thence North 7800 varas so as to reach the point of beginning —

The Deseno shows the point of beginning to be on the margin of Laguna del Alamo, and that the Deep Gullies are at the Sea beach near the border of an (Estero) of the sea formed in the "Ballona," this West line of "Ballona" being the only one excepted to, and there being a natural object well defined & unmistakable at each end of said line, must control the establishing of said line in this survey, as natural objects in boundary lines, being less liable to mistake than other inferior means in determining a line, must control in establishing this West line in said survey.

The grant of "Ballona" describes the South line of the land so granted to be the boundary of Sepulveda's land. This would place the (barrancas) on the border of the Estero some distance from the Sea beach, instead of, at the Sea beach, but as the judicial possession placed it at the Sea beach that becomes the law of the case.

II

The final Decree of Confirmation is the rule governing the United States Surveyor general in making a survey of a private land claim

Sec 13th of Act of Congress of 3rd March of 1851 provides that "It shall be the duty of the Surveyor general of California to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same

Sec 7th of Act of Congress approved July 1st 1864 provides "It shall be the duty of the Surveyor-general of California in making Surveys of the private land claims finally confirmed, to follow the Decree of Confirmation, as closely as practicable whenever such Decree designates the specific boundaries of the claim" In this

case, the specific boundaries are designated in the grant Deseno & judicial possession referred to for description in the Decree of Confirmation — This survey was made probably under the first named law, though not less excusable thereby, but the adjudications of these Exceptions by the U.S. Surveyor general must be made under the law of 1864 and the determination must be governed thereby; said Survey must be corrected so as to conform to the Confirmation which refers to the documents on file in case no. 369 — for discription

III

We now pass to the East boundary line of the rancho "San Vicente y Santa Monica" which is an older grant with a prior judicial possession (as evidence by the Ballona grant) The United States District Court in its Decree of confirmation confirms, first, "the grant of J. B. Alvarado of Dec. 20, 1839, to F. Sepulveda according to the Map of J. J. Warner; And in the other part," the additional lands granted by Pio Pico governor of the Californias to said Sepulveda by deed of grant dated June 8, 1846, and being the surplus lands not heretofore granted to Sepulveda, Machardo, Talamantes, Reyes, Marques & Alanis reference being made to said Grants Maps, judicial possession and depositions on file (No. 457) the Grant of Pio Pico is a Sobrante title for all the land adjoining Sepulveda not before granted to said persons, and as the concession to Marques & Reyes had already been adjudicated by the Mexican Government to belong to Sepulveda (vide sic on file — No 457) it only remained to define the West boundary lines of the ranches "Ballona" & "San Jose de Buenos Ayres" in order to determine the extent of this Sobrante grant, while the grants of the last named ranches recognise the superior title of Sepulveda to defined limits, these limits are well explained by the papers in the cases (especially in Nos. 369 & 457 & 368.)

The papers, maps, and depositions of Carillo & others in Case No. 457, show that Sepulveda's land was segregated by Judicial possession and measurement in 1828,

confirmed by a new grant in 1839 which was approved by Departmental Assembly April 3, 1840 — resurveyed in 1843 & the making of the Warner Map, and also confirmed in 1846, in the Sobrante grant.

We submit that the confirmation referring to the papers on file in case no. 369 establish the west line of "Ballona" beyond the possibility of cavil to extend from Laguna del Alamo to the Deep Gullies (Barrancas) near the border of the (Estero) at the sea beach.

If we were ignorant of the fact that Henry Hancock as U.S. deputy surveyor (now of the law firm of Larrabee & Hancock) made the survey of said "Ballona" claim, we might marvel at the strange revolution that brings this Mexican Record back from the Land Office at Washington for construction and for a determination of the rights of parties under it within the jurisdiction of the Honorable United States Surveyor-general for California in the present year of 1869 —

The Record of Ballona impresses upon us the conviction, that said survey was made in palpable violation of law and the facts, if not in fraud:

That a correction is inevitable so as to conform to the Confirmation, the grant, the Deseno and judicial possession with measurement all corresponding in discription against said survey —

Kewen & Howard
Attys of Contestants

We append the Deseno

Affidavit of Jose del Carmen Sepulveda

In the matter of the survey of the Rancho
Ballona, in Los Angeles County, State of
California, made by Henry Hancock,
U.S. Depty Suvr in July 1858.

Jose del Carmen Sepulveda being duly sworn says, he is 47 years of age, a Citizen of the United States, and a resident of Los Angeles County, State of California.

That he is a son of Francisco Sepulveda, the owner and claimant of the Rancho San Vicente, which adjoins the Rancho Ballona on the North West. That he is well acquainted with the said ranchos, and was present when the juridical measurement was made by the Mexican authorities of the line between the said Ranchos. That he knows well the positions of the Cotton wood (Alamos) tree and the deep gullies (barrancas). That the tree decayed, and fell to the ground, and that thereafter the place where it stood was marked by a pile of stones. That the deep gullies are a prominent and easily known point. That the corners fixed by the U.S. Surveyor Hancock are at the identical places where the Alamos stood, and where the barrancas now are, and were at the time of the juridical measurement.

That the line between the Alamos and the barrancas passes over a high plain, and the line of the Hancock survey is substantially that of the Juridical measurement.

This line has been recognized and adhered to as the dividing line between the Ranchos San Vicente and Ballona for many years, before the time of the Hancock survey.

That he is well acquainted with the natural features of the land of Ballona. That the object marked on the Map of the Hancock survey as "inner bay" is in fact not an arm of the sea, but is only land overflowed at times when storms close by sand the mouth of the creek which runs through the rancho, and which is delineated upon the diseño.

That the stones were placed at the foot of the Alamos at the time of the Juridical measurement, but that the tree has decayed and the stones remain.

his
Jose del Carmen X Sepulveda
mark

Subscribed and sworn to before me
this 29 day of Jan. 1870

Henry M Smith
Notary Public

[Seal]

Affidavit of Tomas Talamantes

In the matter of the survey of the Rancho Ballona, in Los Angeles County, State of California, made by Henry Hancock, U.S. Deputy Surveyor, in July 1858.

Tomas Talamantes being duly sworn says he is 78 years of age, a citizen of the United States, and a resident and citizen of Los Angeles County, State of California.

That he is one of the grantees of the Rancho Ballona, granted by Governor Alvarado in 1839.

That affiant was present when the Alcalde Manuel Domingues gave the possession of said Rancho. That the line between the Ranchos San Vicente and Ballona, ran from the deep gullies in a direct line to the Cotton-wood tree.

That stones were placed at the base of this Cotton-wood tree, because the tree was already decayed and likely to fall. That affiant knows well these two points and has seen them many times each year since and before the possession.

That he went to see them and did see and recognize them within a few days past, to-wit on the 26th of this month. That the survey of Hancock ran the line between the deep gullies & the Cotton-wood tree, or the spot where the Cotton-wood once stood substantially as it was measured at the Juridical possession. That the deep-gullies are objects not easily mistaken, and not to be confounded with other objects.

That Francisco Sepulveda was present at the time the possession was given, and said he wanted a piece of the land, but had no grant or any paper showing his title. That thereupon the Alcalde ran the line straight between the barrancas & the Cotton-wood, and Sepulveda did not further object —

That affiant was present when Leonardo Cota gave the possession of the rancho San Vicente to Francisco

Sepulveda in the year 1846. That affiant was called as one of the Colindantes, and as such appeared on the line with Augustin Machado, and that then the said Cota measured the line from the barrancas to the place of the Cottonwood, and Francisco Sepulveda as well as affiant and Augustin Machado agreed to the Same. That this was the same line as that measured and established in 1839 by Manuel Domingues as the line of the rancho Ballona.

That the feature on the map of the Hancock survey called the "inner bay" is not a bay or arm of the sea, but only land overflowed in times of high water and storms, when the sand blocks up the mouth of the creek. That it is now dry land, and is pastured by cattle sheep and horses.

That affiant has no longer any interest or title to said Rancho or any part thereof.

his
Tomas X Talamantes
mark

Subscribed & sworn to before me
this 29 day of Jan. 1870

Henry M Smith
Notary Public

[Seal]

Affidavit of Ignacio Machado

In the matter of the survey of the Rancho Ballona, in Los Angeles County, State of California, made by Henry Hancock, U.S. Deputy Surveyor, in July 1858.

Ignacio Machado being duly sworn, says, that he is eighty years of age, a Citizen of the United States, and a resident and Citizen of Los Angeles County in the State of California. That he is one of the grantees of the Rancho Ballona, granted Nov 27th 1839 by Juan B. Alvarado, Governor of the Californias. That he was present when the Juridical possession of said Rancho was given. That he knows well the deep gullies (Barrancas) and the Cotton-wood tree (Alamos)

That at the time the possession was given the Cotton-wood tree was about three feet in diameter, but was hollow and decayed. That because of the age and decayed state of the tree, there were stones placed at its roots, better to mark the place.

That the deep-gullies are about in the same condition they were at the time of the Juridical possession, and are objects easily found, and cannot easily be mistaken.

That at the time of the Juridical possession affiant called Francisco Sepulveda to be present at the same, and he was present, as was also Maximo Alanis another adjoining proprietor.

That said Francisco Sepulveda then said he wanted a piece of the land and had asked for the same, whereupon the Judge who gave the possession asked him if he had any document or grant, and he replied that he had not. That then the judge told him he must carry out the order of the Governor and give the possession, and then proceeded to do so — drawing the Cord from the barrancas to the Cotton-wood tree. That Manuel Domingues was the Alcalde who gave the possession.

That affiant was present when the Deputy Hancock made the survey in question. That Francisco Sepulveda died in 1853. That at the time of said survey, Jose del Carmen Sepulveda and Juan Maria Sepulveda sons of Francisco were present and went with affiant and Hancock and pointed out and agreed upon the Barrancas and the Alamos as the dividing line between San Vicente and Ballona.

That the lines as run by said Hancock are substantially the same as those of the Juridical possession, the line between the barrancas & the Alamos being run nearly on a right line between those points. That affiant has within a few days past gone upon the ground, and now states that the points are well-defined and easily recognized — the line being marked with piles of stones, and the pile of stones still remaining at the place where the Alamos stood.

Affiant further says that the feature shown on the map of the Hancock survey as the "inner bay" is not a bay or arm of the sea, but that in times of storms & floods the waves of the sea close the mouth of the creek with sand, and thus cause the waters to rise and overflow the land. That the waters of said overflow are fresh and suitable and are used for watering cattle and horses. That at this time nearly all of the land represented as an "inner bay" is dry land, and is used as pasturage.

his
Ignacio X Machado
mark

Subscribed & sworn to before me
this 29 da[illegible] of January 1870

Henry Smith
Notary Public

[Seal]

Affidavit of Henry Hancock

In the matter of the Protest of S. Haley against the final survey of the Rancho La Ballona, finally confirmed to Don Augustin Machado et al.

Henry Hancock being duly sworn says, that he is the person who as, U. S. Dep Sur, in July 1858, executed the final Survey of the said Rancho La Ballona and that in the execution of the work in the field, there were present at the point marker Station 31, Barranca or Gully, Jose del Carmen Sepulveda and Juan Maria Sepulveda, two sons of the late Francisco Sepulveda, Confirmee of the Rancho San Vicente y Santa Monica, adjoining the Rancho Ballona on the North West. That they were present as the representatives of the said rancho of the Sepulvedas, and as such claimed and pointed out the said Barranca or Gully as the point where the two Ranchos La Ballona and San Vicente y Santa Monica joined each other on the sea shore; and from that point the said Jose Carmen Sepulveda, whom I then supposed to be the elder of the sons of the deceased Francisco Sepulveda, and who was then residing upon the Rancho, was efficient in riding ahead to the different stations of piles of stones along the plain, and pointing them out to me, in company with several other persons, up to what is on my map of the said survey marked Station 35. That on arriving at that point, which is near a small dry arroya, (not marked on the map) some 12 links wide, course Southwesterly, the said Sepulvedas and the owner of the Ballona agreed upon a point on the right bank of said arroya, as the point where the Alamos or Cotton-wood tree, called for in my instructions as a point in the boundary line of La Ballona, once stood, and which point is designated on the map of Ballona as Station 35. That the aforesaid stations, from 31 to 36, were points claimed by the representatives of the two adjoining ranchos, San Vicente y Santa Monica and La Ballona, as being the dividing line of the said ranchos, and that while running the said line no other points were suggested

or talked about by anyone. That at that time it was understood by the owners of both ranchos that I was executing a survey of them both, but for want of time I never completed the field work of the survey of San Vicente y Santa Monica and therefor never made return of it to the office of the U.S. Sur Genl for California.

Henry Hancock

Subscribed & sworn to
before me this 3 day of
Feb. 1870.

Henry M. Smith
Notary Public.

[Seal]

Claimants' Brief re Survey of Rancho La Ballona

BEFORE
The
U.S. SURVEYOR GENERAL
San Francisco, California.

ARGUMENT
In Favor of the Survey of the
RANCHO LA BALLONA,
As Made by
HENRY HANCOCK,
Deputy U.S. Surveyor, in 1858.

Chas. H. Larrabee,
Atty for Claimants.

SAN FRANCISCO:
PRINTED BY TURNBULL & SMITH, LAW PRINTERS,
No. 516 Sacramento Street, below Leidesdorff.
1870.

IN THE MATTER OF THE SURVEY
of the
RANCHO BALLONA,
Before
HON. SHERMAN DAY,
U.S. SURVEYOR GENERAL.

BRIEF FOR CLAIMANTS.

I.

The single question before the Surveyor is, does the survey of 1858 include a part of the Rancho San Vicente y Santa Monica.

No objection is made to any other line than the one dividing these two ranchos; a doubt was raised at some former period whether the feature represented as "inner bay" upon the map of the survey, was, or was not, an arm of the sea, or a harbor. This doubt is dissipated by the affidavits presented herewith, which show conclusively

that this land is now dry and fit for pasturage, and is only covered by the back-water of the creek in times of storms and floods, by the stoppage of the outlet with drifting sands.

This rancho was granted Nov. 27th, 1839 to Augustin Machado *et al*, by Governor Alvarado. The description in the grant is as follows:

* * * * * * * * *

"Bordering at the East with Mr. Policarfio Higuera, "at the North with Mr. Alanis, at the West with Mr. "Antonio Ignacio Avila, and at the South with Mr. "Sepulveda."

The record of juridical possession which was made Dec. 31st, 1839 describes the boundaries as follows:

"On the same day, month and year, being at the foot "of a cotton-wood tree (*alamos*) at a long distance from "the house where dwell Señores Machado and Tala- "mantes, * * * * * by my order the "cord was established from the cotton-wood tree, to "which cuts of a hatchet were given to serve for a "land-mark, a direction to the East, were measured and "counted 7,835 varas, terminating at a little pole-bridge, "which was fixed for a land-mark, at which point was "the adjoining neighbor Don Policarfio Higuera, he not "manifesting any objection, it was given for a perpetual "measurement. From thence the cord was stretched a "direction toward the South, and were measured and "counted 9,800 varas, which terminated at the mouth of "the creek (*Estero*) a place which was fixed for a land- "mark. * * * * * Passing to stretch "the cord towards the West, there were measured along "the sea coast 7,300 varas, which terminated at a point "called the deep gullies (*barrancas*) a situation which "was fixed for a land-mark. From there the rope was "stretched in a direction towards the North, taking a "course so as to strike the cotton-wood tree (*alamos*) "whence the measurement was commenced, and there

"were measured 7,800 varas, the adjoining neighbors "being Francisco Sepulveda and Maximo Alanis, the "former although he indicated that he had asked the "Government for a small piece of this land; but as he "did not present the memorial (*constancia*) nor docu- "ments, these were continued, and the measurement was "given."

The decrees of the Land Commission and of the U.S. District Court *adopt the precise boundaries of the juridical measurement.* The affidavits of Jose del Carmen Sepulveda, (who is a son of the Francisco Sepulveda mentioned in the record of possession) Tomas Talamantes and Ignacio Machado, established beyond question the position of the *Barrancas* and of the *Alamos*, and taken together with the affidavit of the Surveyor, Hancock, show the U.S. Survey is precisely upon the line and between the objects described in the juridical measurement and in the decree of the U.S. Court.

In fact, the Mexican Survey and diseño, and the American Survey and map, are practically the same. Hence I shall conclude, no question will be made before the Land Department as to this fact.

Upon further examination it will be seen that the record of the juridical possession of the Rancho San Vicente, made June 26th, 1846, adopts this precise line, running between the Barrancas and the place of the Alamos (then a stone, the tree having decayed) as the boundary of that rancho, Señores Machado and Talamantes were present and assented to the line.

"• • • • • • the cord was drawn from "the top of a hill of stones (*'Mojonera* of the Warner "Map) the boundary mark of Marquez and Isidro Reyes, "in a direction from North to East (*South to West*) "and there were counted 5,700 varas, which ended in the "first ravine, (*'Barranca'* of the Warner Map) also a "boundary of the said individuals, where appeared "Francisco Marquez, and he was satisfied."

"From this place the cord was drawn W 27¼° N "(*South* 27¼° *East*) and there were counted 2,500 varas, "which ended in the second ravine (*a point also marked "on the Warner Map*) a boundary mark of the Señores "Machado and Talamantes who were present without "manifesting any objection. From this point the cord "was drawn N. 45° E. and then were counted 7,700 varas, "which ended *at a stone*, a boundary mark of the said "Machado and Talamantes and Maximo Alanis."

See affidavits of Carmen Sepulveda, Tomas Talamantes and Ignacio Machado filed herewith, which establish the fact that stones were placed at the foot of the decaying Alamos.

That there is a confusion and misdescription of courses in this record of possession, is made certain by the Warner Map, and is easily shown on the ground where the natural objects are plainly and unmistakeably to be recognized.

See also copy of record attached to brief in the case of Mott *vs.* Reyes and filed herewith and marked exhibit A, and to the Transcript in the San Vicente case, marked Exhibit A.

II

The objections to the survey, are based upon the recitals in the decree of the U.S. Court in Case No. 143, *San Vicente y Santa Monica.*

In deciding upon the objections, in the case now in hand the officers of the Land Department will find it advisable to take up these two surveys and examine them together.

The decree in San Vicente y Santa Monica is as follows:

"The lands of which confirmation is made are the same "known by the name of San Vicente y Santa Monica, "lying in the County of Los Angeles, being in part the "same lands granted to Francisco Sepulveda by Juan B. "Alvarado, Governor of the Californias, by deed of grant

"made on the 20th of December A. D. 1839, and more "particularly described in the map marked 'No. 1, A. F.' "annexed to the deposition of J. J. Warner, taken before "Commissioner Alpheus Felch, and in the depositions on "file; and being in the other part the additional lands "granted by Pio Pico, Governor of the Californias to the "said Francisco Sepulveda, by deed of grant bearing date "June 8th, 1816, and being the surplus lands heretofore "granted to the said Francisco Sepulveda, nor to Augus- "tin Machado, Isidro Reyes, Francisco Marquez or "Maximo Alanis."

It will be seen that the claimants of Ballona have the elder grant, the elder possession, and the elder decree.

But there was no grant of December 20th 1839 to Sepulveda as recited in the decree of December 21st, 1857. None has been found or produced, nor can be. The document of December 1839, (not *December 20th*) *transcript folios* 73, 193, is at best but an "order of concession," and this was arrested and recalled by a subsequent order of the Governor. *Folio* 201. So *no title ever issued under the order,* and the recitation in the decree that a deed of grant was made December 20th 1839, is now seen to be *false in fact.* No boundaries are mentioned — no diseño referred to, none of the necessary conditions required by the Mexican law were annexed to the order. No juridical possession was ever had, until one was given under the grant of Pico in 1846, and which is quoted above.

Thus if the Surveyor looks for the "deed of grant" referred to in the decree, in order to ascertain whether the line between the *Barrancas* and the *Alamos* is or is not correct, he will find no such document. Nor will the "order of December 1839" aid him in any way.

Nor will the map marked "No. 1, A. F." annexed to the deposition of J. J. Warner, throw any more light upon the question.

That map, it will be seen, is a mere outline map of the lands *claimed* by Marquez and Reyes, Maximo, Alanis,

Señors Machado and Sepulveda. It was made in May 1843 — *five years after the grant and Juridical possession of Ballona.*

It cannot for a moment be supposed the U. S. Court intended, by referring to this map, to include the lands of either Machado, Alanis or Marquez and Reyes, as that Court had already rendered decrees in their favor for the *precise* lands shown on the map to be claimed by them respectively.

What then is the meaning of the decree? Plainly this: If there *are* lands delineated on the map over and above the lands granted by Pico, in 1846, and *not* included in the grants of Machado, Alanis, Marquez and Reyes, then *such* lands are confirmed. In other words the decree of the Court gave to Sepulveda the lands included in the juridical possession of 1846, *and as much more as is shown on the Warner map, and not theretofore granted and decreed to the other claimants.* In doing this the Court was misled, for in fact there is no grant to Sepulveda other than the *Sobrante grant* of 1846, and this alone should have been confirmed.

In brief, the claimants of Ballona ask that the survey of 1858 be approved for the following reasons:

I.

Because the survey follows the grant, the juridical possession, the diseño, and the decree of the U. S. Court.

II.

Because the grant, possession, and decree, (conceding a conflict with San Vicente, which we do not) are prior to those of San Vicente y Santa Monica.

III.

Because there is no such thing as a "deed of grant" made to Sepulveda, on Dec. 20th, 1839.

IV.

Because the confirmation according to the Warner map, is only of such land within its lines, *not represented as claimed by Machado, Alanis and Marquez and Reyes.*

V.

Because, even if the apparent force of the decree on its face, confirms portions of the lands of these persons to Sepulveda, the decree being subsequent to the others, is void to that extent.

Opinion of Attorney General. Lester's Land Laws, 643.

VI.

Because the line between the Barrancas and the Alamos, was acquiesced in by Sepulveda in Dec. 1839, (the time of the Juridical measurement of Ballona,) *and was agreed upon by both Sepulveda and the Machados, at the time of the Juridical measurement of San Vicente in June* 1846.

VII.

Because the record and act of Juridical possession of Ballona had all the force and efficacy of a Judicial determination. It bound the former Government, and is equally binding upon the officers of our Government. It is especially binding in this case, for the reason that there is a substantial conformity between the juridical lines, the decree of the U. S. Court, and the survey of the U. S. Deputy.

U.S. v. Pico 5. Wallace 539.
Graham *v.* U.S. 4 Wallace, 261.

CHAS. H. LARRABEE,
Atty for Claimants.

EXHIBITS.

Affidavit of Jose del Carmen Sepulveda.

Jose del Carmen Sepulveda, being duly sworn, says he is 47 years of age, a citizen of the United States and a resident of Los Angeles County, State of California. That he is a son of Francisco Sepulveda, the owner and claimant of the rancho San Vicente, which adjoins the rancho Ballona on the north-west.

That he is well acquainted with the said ranchos, and was present when the juridical measurement was made by the Mexican Authorities of the line between the said ranchos. That he knows well the position of the cotton-wood tree, (*alamos*) and the deep gullies, (*barrancas*). That the tree decayed and fell to the ground, and that thereafter the place where it stood was marked by a pile of stones. That the deep gullies are a prominent and easily known point. That the corners fixed by the U. S. Surveyor, Hancock, are at the identical places where the Alamos stood, and where the Barrancas now are, and were at the time of the juridical measurement.

That the line between the Alamos and the Barrancas passes over a high plain, and the line of the Hancock survey is substantially that of the juridical measurement.

This line has been recognized and adhered to as the dividing line between the ranchos San Vicente and Ballona, for many years before the time of the Hancock survey.

That he is well acquainted with the natural features of the land of Ballona. That the object marked on the map of the Hancock survey as "inner bay" is, in fact, not an arm of the sea, but is only land overflowed at times when storms close with sand the mouth of the creek which runs through the rancho, and which is delineated upon the diseño.

That the stones were placed at the foot of the Alamos at the time of the juridical measurement, but that the tree decayed and the stones remain.

Signed, JOSE DEL CARMEN SEPULVEDA.

[*Verified.*]

Affidavit of Tomas Talamantes.

Tomas Talamantes, being duly sworn, says, he is 78 years of age, a citizen of the United States, and a resident and citizen of Los Angeles County, State of California.

That he is one of the grantees of the rancho Ballona, granted by Governor Alvarado in 1839. That affiant was present when the Alcalde, Manuel Domingues, gave the juridical possession of said rancho. That the line between the ranchos San Vicente and Ballona ran from the deep gullies in a direct line to the cotton-wood tree. That stones were placed at the base of the cotton-wood tree, because the tree was already decayed and likely to fall.

That affiant knows well these two points, and has seen them many times each year, since and before the possession. That he went to see them, and did see them within a few days past, to wit: on the 26th of this month. That the survey of Hancock ran the line between the deep gullies and the Cotton-wood tree, or the spot where the Cotton-wood once stood, substantially as it was measured at the Juridical possession.

That the deep gullies are objects not easily mistaken, and not to be confounded with other objects.

That Francisco Sepulveda was present at the time the possession was given, and said he wanted a piece of the land, but had no grant or any paper showing his title. That thereupon the Alcalde ran the line straight between the Barrancas and the Cotton-wood, and Sepulveda did not further object.

That affiant was present when Leonardo Cota gave the possession of the Rancho San Vicente, to Francisco Sepulveda in the year 1846. That affiant was called as one of the Colindantes, and as such appeared on the line with Augustin Machado, and that then the said Cota measured the line from the Barrancas to the place of the Cotton-wood, and Francisco Sepulveda as well as affiant and Augustin Machado agreed to the same. That this was the same line as that measured and established in 1839, by Manuel Domingues as the lines of the Rancho Ballona.

That the feature on the map of the Hancock survey called the "inner bay" is not a bay or arm of the sea, but only land overflowed in times of high water and storms, when the sand blocks up the mouth of creek. That it is now dry land and is pastured by cattle, sheep and horses.

That affiant has no longer any interest or title to said Rancho or any part thereof.

Signed. TOMAS TALAMANTES.

[*Verified.*]

Affidavit of Ignacio Machado.

Ignacio Machado being duly sworn says, he is 80 years of age, a citizen of the United States, and a resident and citizen of Los Angeles County, in the State of California.

That he is one of the grantees of the Rancho Ballona, granted November 27, 1839, by Juan B. Alvarado, Governor of the Californias. That he was present when the Juridical possession of said Rancho was given. That he knows well the deep gullies (*Barrancas*) and the Cotton-wood tree, (*Alamos*). That at the time the possession was given the Cotton-wood tree was about three feet in diameter, but was hollow and decayed. That because of the age and decayed state of the tree, there were stones placed at its roots, better to mark the place. That the deep gullies are about in the same condition they were at the time of the Juridical possession, and are objects easily found, and cannot easily be mistaken.

That at the time of the juridical possession affiant called Francisco Sepulveda to be present at the same, and he was present as also Maximo Alanis, another adjoining proprietor. That said Sepulveda then said he wanted a piece of the land and had asked for the same; whereupon the Judge who gave the possession, asked him if he had any document or grant, and he replied that he had not. That then the Judge told him that he must carry out the order of the Governor, and give the possession, and then proceeded to do so, drawing the cord from

the Barrancas to the cotton-wood tree. That Manuel Domingues was the Alcalde who gave the possession.

That affiant was present when the deputy, Hancock, made the survey in question. That Francisco Sepulveda died in 1853. That at the time of said survey, José del Carmen Sepulveda and Juan Maria Sepulveda, sons of Francisco, were present, and went with affiant and Hancock and pointed out and agreed upon the Barancas and the Alamos as the dividing line between San Vicente and Ballona.

That the lines, as run by said Hancock, are substantially the same as those of the juridical possession — the line between the Barrancas and the Alamos being run nearly on a right line between those points.

That affiant has within a few days past gone upon the ground, and now states that the points are well defined and easily recognized — the line being marked with piles of stones; and the pile of stones still remaining at the place where the Alamos stood.

Affiant further says, that the feature shown on the map of the Hancock survey as the "inner bay," is not a bay or arm of the sea, but that in times of storms and floods the waves of the sea close the mouth of the creek with sand, and thus cause the waters to rise and overflow the land. That the waters of said overflow are fresh and suitable, and are used for watering cattle and horses. That at this time nearly all of the land represented as an "inner bay" is dry land, and is used as pasturage.

Signed, IGNACIO MACHADO.

(Verified.)

Affidavit of Henry Hancock.

Henry Hancock being duly sworn says, he is the person who, as U. S. Deputy Surveyor in July, 1858, executed the final survey of the Rancho La Ballona, and that in the execution of the work in the field there were present at the point marked Station 31, (Barranca or gully), Jose del Carmen Sepulveda and Juan Maria Sepulveda, two sons of the late Francisco Sepulveda, confirmee of the Rancho San Vicente y Santa Monica, adjoining the Rancho Ballona on the North West. That they were present as the representatives of the said Rancho of Sepulveda, and as such claimed and pointed out the said Barranca or gully or the point where the two Ranchos, La Ballona, and San Vicente y Santa Monica, joined each other on the sea shore; and from that point the said Jose Carmen Sepulveda, whom I then supposed to be elder of the sons of the deceased Francisco Sepulveda, and who was then residing upon the Rancho, was efficient in riding ahead to the different stations of piles of stones along the plain, and pointing them out to me, in company with several other persons, up to what is on my map of the said survey, marked Station 35. That on arriving at that point, which is near a small dry arroya (not marked on the map) some 12 links wide, course south-westerly, the said Sepulveda, and the owners of Ballona agreed upon a point upon the right bank of said arroya, as the point where the Alamos (Cottonwood tree), called for in my instructions, as a point in the boundary line of La Ballona, once stood, and which point is designated on the map of Ballona as station 35.

That the aforesaid stations, from 31 to 36, were points claimed by the representatives of the two adjoining Ranchos, San Vicente y Santa Monica and La Ballona, as being the dividing line of the said Ranchos, and that while running the said line, no other points were suggested or talked about by any one. That at that time it was understood by the owners of both Ranchos, I was executing a survey of them both, but for want of time I

never completed the field-work of the survey of San Vicente y Santa Monica, and therefore never made returns of it to the office of the U. S. Surveyor General for California.

HENRY HANCOCK.

[*Verified.*]

Claimants' Statement and Diagram re Survey of Rancho La Ballona

A. J. Britton *W. J. Gray*

BRITTON & GRAY,
Attorneys at Law,
Patent titles from the United States to agricultural, mineral, and grant lands
N. 509. SEVENTH ST. MAY BUILDING.

Washington, D.C. April 11th 1873

Hon. Willis Drummond
Commissioner of General Land Office

Sir: We have the honor to file herewith for your consideration a statement and diagram in matter of survey of the Private Land claim "La Ballona" in Los Angeles Co. Cal.

Very Respectfully
Yr. Obt. Svrts.

Britton & Gray
Attys for La Ballona

In the matter of the Survey of the Rancho "La Ballona" finally confirmed to Augustin Machado et. al.

First — As to the objections set forth in the letter of the Hon. Commissioner of March 17th 1860, he is most certainly wrong in the construction which he puts upon the calls set out in the final Decree of Confirmation, Diseño, and Act of Judicial possession; and very inconsistent in his opinion as to the manner in which the Rancho should be Surveyed in conformity to said Decree, possession, xc. He must have been misled from the true facts of the case by some of the features of the Map of the Survey before him: although that Map corresponds remarkably well with the original Diseño. That portion of the map marked "Inner Bay" has evidently been considered by the Commissioner a portion of the Sea and not included in the Diseño or judicial possession (but this is not the case) he therefore directed this portion to be

excluded; by refering to the original Diseño it will be seen that the word "Estero" is found written on the same near the Sea Shore; this is the same place as that marked on the Map of Survey "Inner Bay" which is formed by the waters of the Ballona Creek, and is increased or diminished in extent as the outlet of the same to the Sea is more or less choked up by the shifting sands of the Sea Beach, from this cause some times quite a large area of land will be covered with the back water of the creek, and at other times there is scarcely any water at all on the land and the same is very rich, covered with a luxuriant growth of grass, and herbage, and is pastured by cattle, sheep, and horses, (See — Affidavits of Jose del Carmen Sepulveda, Tomas Talamantes, and Ignacio Machado — filed in the case) and as the water is at times increased or diminished by the before mentioned cause, and at times there is no water at all, and land being covered with a growth of grass, and pastured by cattle, horses, and sheep, there is no defined shore line to this so called "Inner Bay" and it can in no way be taken for the "Playa" (Sea Coast) mentioned in the Act of Judicial possession and Desiño, as a boundary.

The boundaries set forth in the Judicial possession, and Decree, are as follows: "Beginning at a cottonwood tree at a considerable distance from the house of Said Rancho, which is marked with hatchet cuts — thence running East or towards the East (rumbo al Este) "7835 Varas to a little pole bridge — thence South" or towards the South (rumbo al Sur) "9800 Varas to the Mouth of a Creek (Estero) thence West", or towards the West (rumbo al Oeste) "along the Sea Coast 7300 Varas to the deep gullies (Barrancas) — thence Northerly" or towards the North (rumbo al Norte) "7800 varas to the place of beginning".

Now the Commissioner suggests in his letter of March 17th, 1860, that the first line set forth in the foregoing description be run from the Cottonwood tree, the place of beginning of the Judicial possession (which is ascertained to be correctly located at Station No. 36 of the official Survey) on a course exactly East by the magnetic needle 7835 varas —

This line would cut the Rancho "Rincon de los Buyes" about half in two the distance (7835 varas) would extend entirely across that Rancho and some distance into the adjoining Rancho "Las Cienegas," and terminate in a level valley over a mile in any direction from a hill, while the Desiño (which is referred to, and made a part of the Decree of Confirmation) shows this line to terminate at the point of hills "lomas de los Carretos" — Now if the Commissioners Construction were a proper one that this first line should run exactly East, then the same application should also govern all the other lines of the Survey, for the terms used both in the Judicial possession, and Decree of Confirmation are exactly the same, in given the direction that each line shall run — for instance take the Judicial possession, the first line "*rumbo al* Este" — Second line "*rumbo al* Sur" — third line "*rumbo al* Oeste" — fourth line "*rumbo al* Norte". See the term used in each line is exactly the same. As is also in the Decree of Confirmation — first line *East* — Second line South — third line West, fourth line North. So if by the Decree the first line must be run exactly East, then by it also must the next line be run exactly South — but in doing so it would run entirely across the Ranchos Paso de la Tijera, and "Centinela" including a large area of each of those Ranchos within the "Ballona", and the distance (9800 varas) would terminate in the Rancho "Sansal Redondo" some six miles from the mouth of the Estero at which this line should terminate, according to the Judicial possession, and Decree of Confirmation, and upon the same ground, the same construction should be applied to the third line and it would run West & so on. It is unnecessary to follow this construction of the directions given in the Decree and Judicial possession further as we find that we can not apply it to a single line of the Rancho, and if it is applied to any one line it must with the same authority be applied to all of them.

But in directing the proper way to establish the Second line of the Judicial possession, the Commissioner seems to entirely abandoned the construction which he set out upon and adheared so closely to, in fixing the first line, for in determining the Second line he directs that it shall

be run without regard to the direction of the line as given in the Judicial possession and Decree, which as construed by him should be exactly South, but he suggests that this line be run from the termination of the distance of the first on a course exactly East from the Cottonwood tree (place of beginning) with-out regard to course" 9800 varas to a point on the shore a little to the East of the mouth of the creek "Ballona".

Now I take it that the Commissioner's idea is that this line should run to a point on the shore line on the so called "Inner Bay" a little to the East of the point where the Ballona Creek intersects the same, as shown on the Map of the Official Survey; this point it would be impossible to ascertain exactly; from the facts before stated; first the so called Inner Bay has no defined shore line; secondly the true and only mouth to the Ballona Creek is through the Estero in the South East corner of the Map of Survey and marked on same "Inlet." If this second line were run as suggested by the Commissioner — namely from the termination of the first line (run as suggested by him) to the designated point on the Map of Survey, the course of the line would instead of being South (as it should be according to his construction and application given in the first line) be a departure of about 50° West of South.

The third line he suggests should run along the Coast of the so called "Inner Bay" 7300 varas to the gullies (Barrancas). As it has been before shown there is no defined shore line to the so called Inner Bay — nor do we meet with any gullies untill we arrive at that laid down at the Westernmost corner on the Map of Survey — were the Northern extremity of the so called "Inner Bay" as shown on the map of Survey (if the same could be ascertained upon the ground) taken as the proper termination of the third line of the Act of Judicial possession (as suggested by the Commissioner) and the last line drawn from that point to the place of beginning (as also suggested by him) then the whole of that part shown and marked on the Diseño *"lomas muertos"* (dry or dead hills) would be excluded from the Survey of the Rancho.

Let us now look at the present survey now before the Commissioner and see how it compares with the original **Diseño, Judicial possession and Decree.**

The Cottonwood tree (the place of beginning) of the Judicial possession is ascertained to have stood at Station No. 36 on the map of Survey. The line runs thence Easterly to the point of a hill, by which passes a stream fringed with timber, and a road all of which corresponds with the features pictured upon the Diseño.

The Second line passes over some hills in a South Easterly direction as shown on the Diseño, and making an angle takes a general direction towards the South skirting along the hills on the East side of a valley and low grounds to the Sea Shore near the mouth of the Estero, as shown by the Diseño and Judicial possession.

The next line runs along the Sea Shore to the first deep gullies (Barrancos) which are met with. And from thence the last line is drawn to the place of beginning over, and including about the same proportion of the dead hill ("lomas muertos") as is shown by the Diseño. This encloses a tract of land which in shape, and points of topography corresponds remarkably well with the Diseño, and the course, and distances of the Map of Survey also agree as nearly as is usually the case with the directions and distances given in Acts of Judicial possession, for in performing such acts they did not except in a few instances use any instruments for ascertaining the exact courses of the lines, and the directions of the lines are only intended to be given approximately, for instance as in this case "rumbo al Este" (towards the East) this term is not intended as a due East course (as construed by the Commissioner) but a line running in the direction towards the East or Easterly which would be just as applicable to a line running South East, as to one running East, and so on with regard to all the lines of this Rancho. The measurements were also made in the rudest, and most careless manner, and in this case they correspond as nearly as in most cases where accurate measurements are made on the ground. On most of the lines the Surveyor has laid down on his Map of Survey

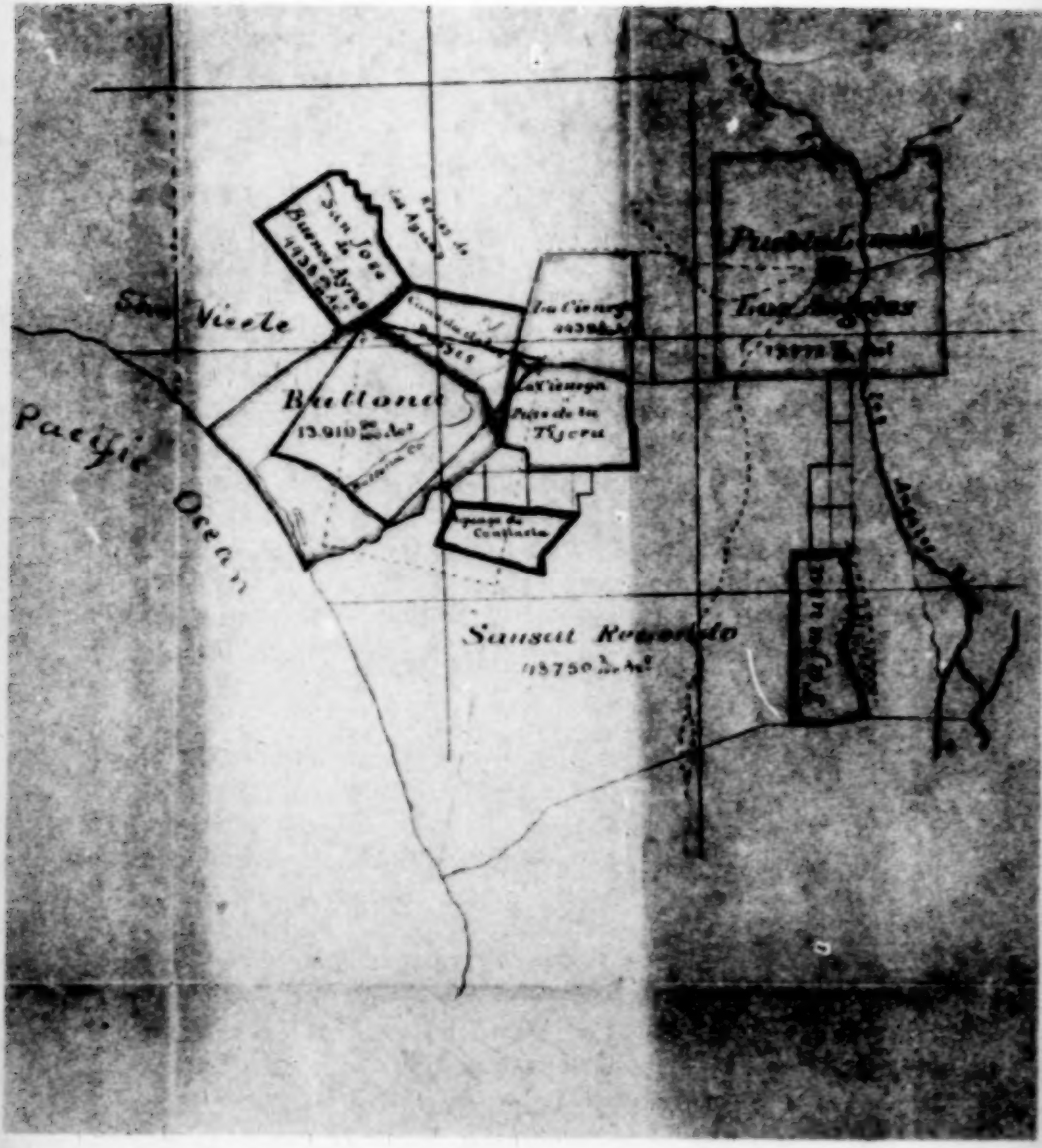
"Old Corner," or "Original Corner" — this taken with the fact that this Rancho is formed upon the North East, and South East by other grants, the claimants of which make no objections to the Survey, shows very conclusively that those two lines are correctly established by the Official Survey; and were these lines now disturbed or changed, it would create conflicts which would lead to long and expensive litegation against the will of all parties interested. There can be no doubt also as to the Southern boundary having been correctly established by the Official Survey — for it is in accordance with the Diseño, Act of Judicial possession, and Decree of Confirmation, the latter making use of the expression *"along the Sea Coast"*, and the 7th Section of the Act of Congress of July 1st 1864 requires that the Survey shall be made in strict accordance with the Decree of Confirmation.

The North Western boundary must also be correctly established by the Survey now before the Commissioner, for it runs from the *first* and *only deep gullies* (Barrancas) which are met with on the Sea Shore, between the mouth of the Estero, and that point, and corrisponds with the Diseño in embracing about the same proportion of dead hills ("lomas muertos") within the Rancho, as are represented by it. There was no objection, or dispute as to this being the correct line between the Ranchos "San Vicente" and "La Ballona" at the time the Survey was made — nor for many years thereafter. On the contrary this very line was pointed out to the Surveyor on the ground at the time he was executing the Official Survey as the dividing line between the two Ranchos, by two sons of Francisco Sepulveda, who represented their farther, the Confirmee of the former Rancho on that occasion, and the same line was then, and there agreed upon by all parties interested as the true and correct boundary line between the two Ranchos (See the affidavits of Henry Hancock Ignacio Machado, Tomas Talamantes, and Jose del Carmen Sepulveda, on file in the case). All parties interested in this and the adjoining Ranchos knew at the time of the Survey being made, and of the lines of the Rancho being thus established, the Survey was duly advertised, and about ten years elapsed

after said Survey was made before any objection was made to it, in behalf of any adjoining Rancho, and the Sons, and family of Francisco Sepulveda the confirmee of the "San Vicente" still disclaim that they, or their father ever pretended to claim any part of the land now contested by Haley and others, as part of his grant.

The Rancho is certainly entitled to a patent as sent up, and no other Survey can be made to harmonize so nearly with all the Calls set out in the Judicial possession, Diseño, and Decree of Confirmation.

Britton & Gray
Attys. for La Ballona


San Vicente
Pacific Ocean
Ballona
13.910 Acres
Sunset Rancho
13750 Acres

Letter from Willis Drummond

R. Hardenbergh, Esq.,
U.S. Surveyor General
San Francisco, Cal.

Department of the Interior
General Land Office
Washington D.C.
Apr. 30, 1873

Sir;

This office has had under consideration the papers in the matter of the rancho Ballona in California. Augustin Machado et al. confs. a survey of which containing 13,919$^{99}/_{100}$ acres, was made by Deputy Surveyor Henry Hancock in July, 1858, approved by the Surveyor General of California Sept. 18, 1858 advertised in September and October, 1860, and re-advertised in 1869.

The original grant was made on the 27th, Nov. 1839, by Juan B. Alvarado, then Governor of the Department of the Californias, to Augustin and Ignacio Machado and Felipe and Tomas Talamantes for "the land known by the name of Ballona, bounded on the West by the ranch of the citizen Policarpio Higueroa, on the North by that of the citizen Alanis; on the West (poniente mistake for Este) by that of the citizen A. Ignacio Abila, and on the South by that of the Sr. Jose Sepulveda." Juridical possession of the land granted was given on the 31st December, 1839 with the following described boundaries, to wit: "From the cotton-wood tree, to which cuts of a hatchet were given, to serve for a land mark a direction to the East were measured and counted seven thousand eight hundred and thirty-five varas, terminating at a little pole bridge which was fixed for a land mark at which point was the adjoining neighbor, Don Policarpio Higuera, he not having manifested any objection it was given for a perpetual measurement. From thence the cord was stretched a direction towards the South, and were measured and counted nine thousand and eight hundred varas which terminated at the mouth of a creek (estero) a place which was fixed for a land mark, but when it was measured Antonio Ignacio Avila charged that this situation or place belonged to him, and having asked

him for the documents which would prove it his property he did not present them, but said the plat (diseño) was in Monterey for which cause it was fixed for a measurement. Proceeding to stretch the cord towards the west there were measured along the Sea-coast seven thousand and three hundred varas, which terminated at a point called the deep gullies ('barrancas') a situation which was fixed for a land mark. From there the rope was stretched in a direction towards the North, taking a course so as to strike the cotton-wood tree, whence the measuring was commenced, and there were measured seven thousand and eight hundred varas, the adjoining neighbors being Francisco Sepulveda & Maximo Alinis, the former although he indicated that he had asked the Government for a small piece of this land; but as he did not present the memorial ('constancia') nor documents these were continued, and the measurement given."

The petition of the claimants soliciting the confirmation of their claim was presented on the 2d day of October, 1852, to the Board of Land Commissioners and on the 24th of February, 1854, the said Board rendered a decree of confirmation for the land as described in the record of Juridical possession and on appeal to the District Court of the United States for the Southern District of California the decision of the Board of Land Commissioners was confirmed at the December Term 1855 of said Court, and it was "further ordered adjudged and decreed that the claim of the appellees to a certain tract of land in Los Angeles County, West of the City of Los Angeles — about three leagues and bordering on the sea shore called the 'Ballona' is valid, that said tract of land being the same now and for the last 18 or 19 years occupied by the appellees, and bounded as follows viz: Beginning at a cotton-wood tree at a considerable distance from the house of said rancho which is marked with hatchet cuts, thence running East 7835 varas to a little pole bridge thence South 9800 varas to the mouth of a creek (Estero) thence West along the sea coast 7300 varas to the deep gullies (Barancos) thence Northerly 7800 varas to the place of beginning; reference for a more particular description being had to the grant, map and juridical

possession on file in this case." At the Dec. Term, 1856, of said court the appeal to the Supreme Court of the United States was dismissed and the decree rendered on the 19th day of December, 1855, made final.

A survey of this rancho was made by Henry Hancock in July, 1858, approved by the U.S. Surveyor General for Cal'a, on the 18th of Sept. 1858 and transmitted to this Office immediately thereafter, which said survey after examination here, was returned to the Sur. Gen'l. on the 17th day of March, 1860, for re-examination, and "unless good cause be shown to the contrary, after notice to all concerned, for amendment of the survey in conformity to the views of this office as set forth in" said letter of March 17, 1860. What those views were it is not necessary now to examine, for before the survey was amended the Act of July 1st 1864, (13 stats. p. 332) was passed; the Honorable Secretary of the Interior by letter of November 19th, 1868, directed this survey to be published under said Act; and the said survey having been so published in March and April, 1869 was duly objected to in accordance with the provisions of said Act, and is therefore now before this office, on its merits, without regard to any opinion expressed by this office prior to said publication.

This rancho was confirmed by boundaries and these boundaries are clearly set forth in the final decree of confirmation. The survey now under consideration must conform to said boundaries as explained by the reference in the decree to the grant, diseño and juridical possession.

For convenience I commence the examination of this survey by a consideration of the line drawn between two of the natural objects mentioned in the record of juridical possession and final decree in this case, to wit, the barancas or deep gullies and the alamos or cottonwood tree, the last of which is described in the record as the place from which juridical measurement was commenced.

The first named of these natural objects is not shown on the diseño of the Ballona rancho, nor is it mentioned in any of the original papers filed in this case before the

Board of Land Commissioners for Cal'a, except in the juridical possession where it is described as having been reached by measuring from the mouth of an estero, West, along the sea-coast seven thousand three hundred varas. On the present survey these gullies are located at the extreme south-western corner thereof.

The second of these natural objects is not particularly described on the diseño in this case, though at the Northwest corner of said diseño is marked "laguna del Alamo y lindero del ser Alamis" (lake of the cottonwood and boundary of Senor Alamis). The directions of the lines run, as given both in the juridical possession and final decree, show however, that this cottonwood tree was at the northwest corner of the Ballona rancho, a "long distance" west from the "house" of said rancho, and also west 7835 varas from "a little pole bridge," and in making the survey now before me the deputy surveyor has scaled the site of said cottonwood at the northwest corner of his survey, and at the intersection of the southern line of the rancho Rincon de los Buyes, granted in 1821, and 1843, to B. Higuera and patented Aug. 27th, 1872, with the southeastern line of the rancho San Jose de Buenos Ayres granted in 1843, to M. Alamis and patented July 25th, 1866. Less than forty chains east from this point, as appears by the field-notes of the survey in this case, is a dry lake ten chains from east to west and three chains from North to South, thus apparently answering the description of the northeastern corner of this rancho on the diseño where is found the "lake of the cottonwood and the boundary of Alamis" i.e. rancho San Jose de Buenos Ayres. The diseño further shows the Western boundary of the Ballona to be the eastern boundary of Sepulveda's rancho San Vicente, and the record of juridical possession shows that this boundary of Ballona was also the eastern boundary of a part of Maximo Alimas's rancho, the last of which was patented by the U.S. in 1866 as before stated. It also appears by an inspection of the diseño, and of the plat of Hancock's survey that the relative position of the northwest and southwest corners and the creek as shown on both diseño and plat, is substantially the same.

The testimony filed by contestants relative to this boundary is as follows:

Fernando Sepulveda in an affidavit dated April 26th, 1869, before A. E. Sepulveda, Deputy Clerk of the Dist. Court for Los Angeles Co. Cal'a, testifies that he was raised upon the rancho San Vicente y Santa Monica; that his father was the grantee of said rancho; that at the time of Juridical possession of said rancho in 1828, the east boundary line was established by measuring from the head of the arroyo Seca at a place called Cañada de mangles and ending at the opening of said arroyo into the sea at a place called deep gullies and including the Laguna de los Alamos and loma colorada; that the deep gullies are very near the margin of the estuary of the seca in the Ballona rancho; that the Ballona rancho never extended west of a north and south line running from the loma colorada to the deep gullies; and that the survey of the Ballona as now made running from the arroyo seca, south west to the ocean, embraces a large portion of the rancho San Vicente y Santa Monica. There is also filed on behalf of contestants an affidavit dated May 3, 1869, signed by Salesburg Haley and Jose Dolores Sepulveda to the effect that they are the owners of the San Vicente y Santa Monica confirmed to Ramon Serrano Sepulveda L.C. No. 457, which rancho adjoins the rancho Ballona on the west; that they are familiar with all the boundaries of the rancho owned by them as marked out in 1828, by Jose A. Carillo; that the east boundary line of said rancho embraces the following known objects, to wit, the "Canada de Mangles, the Arroyo Alamis or seca, the laguna de Alamo, the table land to the loma colorado, thence in a direct line to the deep gullies at the sea beach near to the estuary of the Ballona;" and that the present survey of the rancho Ballona embraces a large tract of the rancho San Vicente y Santa Monica.

In opposition to the statements contained in the foregoing, there was filed in behalf of the owners of Ballona with the Sur. Gen'l the following affidavits:

1st Affidavit dated Jan'y 29, 1870, by Jose del Carmen Sepulveda in which he states that he is 47 years of age,

a citizen of Los Angeles, and the son of Francis Sepulveda claimant for the rancho San Vicente adjoining the Ballona on the northwest; that he is well acquainted with said ranchos and was present when juridical possession was given by the Mexican authorities of the line between said ranchos, and knows the position of the cottonwood (alamos) trees and the deep gullies (barrancas); that the tree decayed and fell to the ground and thereafter the place where it stood was marked by a pile of stones; that the deep gullies are prominent and easily known, and that the corners fixed by the U.S. Surveyor Hancock are at the identical places where the alamos stood and where the barrancas now are and were at the time of juridical measurement; that the line of Hancock's survey between those two points is substantially the line of the juridical possession; and that for many years before Hancock's survey this line has been recognized as the dividing line between those two ranchos.

2d. The affidavit dated Jany 29, 1870, by Tomas Talamantes in which affiant states he is 78 years of age a resident of Los Angeles and one of the grantees of the rancho Ballona granted by Alverado, and was present when the juridical possession of said rancho was given in 1839; that the line of the juridical survey between the Ballona and San Vicente ranchos was a direct line from the cottonwood trees to the deep gullies; that the line of Hancock's survey between these two points is substantially that of the juridical possession; that he was also present when possession was given of the rancho San Vicente in 1846, as was also Francis Sepulveda and Augustin Machado; that a line was run from the cottonwood to the barrancas which was the same as that established in 1839, as the line of the rancho Ballona, and that Sepulveda, Machado, and affiant agreed to the same.

3d. An affidavit dated Jan'y 29, 1870, by Ignacio Machado in which affiant states he is 80 years of age, a resident of Los Angeles, Cal'a, and one of the original grantees in 1839 of the rancho Ballona; that he was present when juridical possession was given of said rancho, knows the position of the cottonwood tree and

deep gullies, the former of which was then about three feet in diameter and because of its decayed state stones were placed at its roots the better to mark the place; that said tree is now destroyed, but the pile of stones at the date of this affidavit was in about the same condition as when juridical possession was given, easily found and not easily mistaken; that when the possession of the Ballona rancho was given in 1839, Francisco Sepulveda (who died in 1853) was present and said he wanted a piece of the land but upon being asked by the judge if he had any document or grant he replied he had not, whereupon the alcalde (Dominguez) ran the line from said cottonwood to the barrancas; that when, Hancock made the survey of the rancho Ballona, Jose del Carmen Sepulveda, and Jose Maria Sepulveda sons of Francisco Sepulveda were present and went with affiant and Hancock and pointed out and agreed upon the Barrancas and the Alamos as the dividing line between San Vicente and Ballona, and that this line as drawn by Hancock is substantially the same as that of the juridical possession.

4th. An affidavit dated Feb'y 3d, 1870, by Henry Hancock who swears he is the U.S. Deputy Surveyor who, in 1858, made the survey now under consideration; that at the point marked on the plat of his survey "Station 31. Barranca or gully," Jose del Carmen Sepulveda and Juan Maria Sepulveda were present as the representatives of the rancho San Vicente y. Santa Monica and pointed out said barranca or gully as the place where the rancho San Vicente and Ballona joined each other on the sea shore; that from that point Jose Carmen Sepulveda who was then residing on the ranch was efficient in riding ahead and pointing out the different piles of stone along the plain up to what on the plat of affiants survey is marked "Station 35;" that on arriving at that point, "which is near a small dry arroyo (not marked on the map) some twelve links wide, course southwest, the said Sepulveda and the owner of the Ballona agreed upon a point on the right bank of said arroyo, as the point where the Alamos or cottonwood tree, called for in my instructions as a point in the boundary line of La Ballona, once stood;"

that the stations on said map from 31 to 36 were claimed by the representatives of the ranchos San Vicente and Ballona, as the dividing line of said ranchos; that while running the said line no other points were suggested or talked about by any one; and that at the time of the survey it was understood by the owners of both ranchos that affiant was making the survey for both ranchos.

From a careful review of the foregoing it is clear that the weight of evidence is to the effect that the western boundary of the Hancock survey of the rancho Ballona was correctly located according to the calls of the grant as given in the final decree and record of juridical possession; thus corroborating the apparent location of said boundary as shown by a comparison of the original title papers of the Ballona rancho with each other and with the boundaries of adjoining ranchos. The length of this line according to the measurements given in the final decree and record of possession is 7800 varas equal to about 330 chains; the distance between the barrancas and site of the cottonwood as shown by the U.S. survey is about 360 chains a difference of 30 chains, or $\frac{3}{8}$ of a mile.

From the cottonwood the boundary on the north extends east, according to the final decree and record of possession 7835 varas to a "little pole bridge." Where this bridge is located is not shown by any evidence in the case; yet near the northeast corner of the diseño is a stream of water running north and south to an estero near the ocean, from which it is probable that this stream passes near said bridge. On the plat of Deputy Surveyor Hancock's survey the northeast corner thereof is placed near said stream, and to that extent corresponds with the diseño; and as said northern boundary of the rancho Ballona, as shown by said survey adjoins for its entire length the rancho Rincon de los Bueyes which has been patented by the United States and as the length of said line east from the site of the cottonwood to the northeast corner as shown by the survey, is 90 chains, or more than one mile shorter than the length of said line as shown in the record of possession and final decree, I accept as the

true boundary on the north the line as run by Hancock and represented on the plat now under consideration.

From the northeast corner the boundary on the east extends according to the final decree and record of possession south 9800 varas, equal to about 413 chains to the mouth of an estero. That this boundary is not a straight line appears by the diseño, and upon an examination of the U.S. Survey it also appears that the general shape of this boundary as given on the diseño has been preserved in said survey, that is to say, from the northeast corner it runs a short distance south and east and then, according to the diseño, due south, but according to the U.S. Survey south and west to the ocean making the entire survey form a nearly square figure. As before stated the call for the south-east corner of this rancho is the mouth of an estero, or where it empties into the ocean, which point as shown by the plat and field notes of the survey by Hancock is at some place east of the south-east corner of said survey and wholly outside its limits. The character of this estero, or inner bay as it is marked on the plat of survey, is testified to by Tomas Talamantes, Jose del C. Sepulveda and Ignacio Machado, who in substance say it is not an arm of the sea, and that much of the tract represented as inner bay is suitable for pasturage. That this estero was included in the grant is shown by the diseño where the word "estero" is written near the south boundary and about midway between the east and west boundaries as there represented, and that it is not an arm of the sea is evident from the field notes and plat of survey which are not contradicted by any evidence in this case, and which show that what this office in 1860, mistook for the mouth of an estero was meandered on its south-east side to within a few chains of the ocean, and that on the east of said meandered line were found high hills, that this inner bay is not an arm of the sea and that the mouth of this estero is wholly outside the present survey of the Ballona rancho is also shown by an official survey of the rancho Sansal Redondo which adjoins the southern portion of the eastern boundary of Hancock's survey of Ballona.

The eastern boundary of this rancho as surveyed by Hancock is therefore approved and so too is the South boundary as thus surveyed, though it is apparent that had the claimants or any party in interest objected to this survey the eastern terminus of the South boundary and the southern terminus of the eastern boundary might have been extended, according to the final decree on title to the mouth of the estero above mentioned, that is to say to where it empties into the ocean.

As has been already remarked the diseño and the plat of Hancock's survey in this case each inclose a tract of land of nearly square form; and to this I add that the aggregate number of lineal varas measured by the Mexican Alcalde in giving juridical possession as shown by the record thereof, give, when reduced to chains, a distance nearly as great as that run by U.S. Deputy Surveyor Hancock and represented on the aforesaid plat of survey. The distances from point to point are as follows:

According to the record of possession and final decree, from the cottonwood east to the pole bridge is 7835 varas, equal to about	335 chains.
Thence south to mouth of Estero 9800 varas, equal to about	410 chains.
Thence west to the barrancas 7300 varas, equal to about	308 chains.
Thence north to the cottonwood tree 7800 varas, equal to about	330 chains.
A total length of	1383 chains.
According to the plat of survey, a direct line from the site of the cottonwood east to the northeast corner is about	240 chains.
Thence south and east to point marked no. 2; and thence to southeast corner of survey, is about	520 chains.
Thence westerly to barrancas is about	335 chains.
Thence northerly to cottonwood site is about	360 chains.
A total of	1455 chains.

thus showing the total distance measured by the Alcalde to be 17 miles and twenty-three chains, and the total distance from point to point as established by Hancock 18 miles and 15 chains, making a total difference between the two measurements of but 72 chains or nine tenths of a mile.

From the foregoing facts I decide that the survey under consideration containing 13,919$^{99}/_{100}$ acres and made by U.S. Deputy Surveyor Henry Hancock in July, 1858, should be approved by this office.

You will give notice of this decision to all parties in interest and allow sixty days from the service thereof for appeal to the Hon. Sec. of the Interior, at the expiration of which time you will make the usual return.

Very respectfully,

Willis Drummond
Commissioner

Contestants' Appeal of
General Land Office Decision

U. S. SURVEYOR-GENERAL'S OFFICE,
San Francisco, July 22, 1873.

Hon. Willis Drummond
Com. Genl. Land Office
Washington, D.C.

Sir:

I have the honor to transmit a statement on appeal filed in this office June 12 last, in the case of the Rancho "Ballona" appealing to the Hon. Secretary of Interior from your decision in said case.

Upon the receipt of your decision I notified all parties in interest requiring appeal to be taken on or before the 12th inst.

The appeal of Messrs Haley and Sepulveda herewith is the only document filed in said case in response to the notices served.

Very Respectfully

Your Obt. Servt.
J. R. Hardenbergh
U.S. Sur. Genl.
for California

Hon. Willis Drummond
Commissioner of the General Land Office
Washington, D.C.

Sir:

Please take notice that in the case of the Survey of Rancho Ballona in Los Angeles Co. California, decided by you in April 1873, S. Haley and J. D. Sepulvada protestants claiming title in the Rancho "San Vicente y Santa Monica" to lands embraced within the bounds of said Survey, hereby appeal from the decision rendered by you in said case, to the Hon. Secretary of

the Interior, and for grounds of appeal cite the following points of exception —

1st That said decision is contrary to law:

2nd That said decision is contrary to the Record evidence in the case.

3rd That said decision is not in accordance with the final decree of confirmation.

4th That said decision is founded on evidence, contradicting the Mexican documents filed in the case.

This Grant is by boundaries (as stated in the decision (The Map (Diseno) was the only description, of those boundaries, in all the proceedings of the Mexican Government, in the case up to the time of the Juridical possession by Manuel Domingues Alcalde, Decr. 1839, except the recitals in the petition and Grant, towit: "That it was bounded by Alanis-Higuera-Abila and Sepulveda and that it was one league of land."

The West line of this Survey is alone in controversy with us which we claim largely encroaches upon our land in the adjoining Rancho of Sepulveda.

The Map (Diseno) having been the basis of description in forming the entire Expediente in this case, should as the key to this Survey, be closely scanned in this proceeding by the Land Office.

The Map (Diseno), describes this West line of the Grant by unmistakeable natural objects, as follows. The North West corner is fixed at the Cottonwood lake (Laguna del Alamo) and the South West corner is defined by the name "barrancas," deep gullies, or a water slough, and the line, connecting these water reservoirs in the two Westward corners, runs North by West & South by East, and is marked on the Map (Diseno) "Sanjones" the name signifies that it runs to natural sloughs of water, which is verified by the fact that on the North, it has the Cottonwood lake (Laguna del Alamo) and on the South the slough formed by the ocean, the termination of the arm of the Sea.

The Juridical possession was a proceeding by the local alcalde, and intended only to mark the boundary lines of the Grant, and put the Grantee in possession, with the formalities of law (but not to enlarge or diminish the Grant). Manuel Dominques was the Alcalde in the proceeding in this case — He fixed the initial point at the Cottonwood lake (Laguna del Alamo) in the North West corner of the Grant, there was the Cottonwood tree with hatched marks. He thence run the first line East 7835 varas. Thence South 9800 varas to the mouth of a creek, which empties into the North East part of Estero or Bay (See Map). Thence along the beach of this bay West 7300 varas to the barrancas, or deep gullies, or sloughs of the Bay and at the South end of the West line "Sanjones" of Grant, that runs South by East from the lake in the North West corner thereof called "Cottonwood Lake" (Laguna del Alamo), take all these objects together as features of the country described upon the Map, and they not only fix this point, the South West corner of the Grant, but they unmistakeably fix the mouth of the creek and the route of the line along the inner beach of this Bay.

The Map (Diseno) having been the only description to guide the Alcalde, except the recitals of the neighbouring occupants, must be strictly adhered to in determining the West line of this Survey, for Sepulveda defiantly Stands on the South West Side, protected by the recitals, in this Grant, besides his ancient possessions, and the Alcalde knew that he could not include in this Survey the arm of the ocean without express authority —

Commissioner Wilson rejected this Survey because it embraced the Arm of the Sea, and sent it back, for the double purpose, of having it published under the Act of July 1st, 1864, and having it corrected in the manner designated by him —

The rejection and our exceptions, on the publication, brought eminent counsel into the case, who saw at a glance, that the two water ponds, in the Map and upon the premises, presented an irresistable barrier, to the retaining the Plains of San Vicente in the bounds of the

Survey; taking the cue from Judge Hoffman's decisions as to Mexican witnesses on land titles, they brought to light the Affidavits herein filed, which declare that this Arm of the Sea, specially designated upon the (Diseno), on Hancocks Map of Surveys, and on this County Map, and whose limped Surface is daily whitened with Sails of Will Tell's Hotel, numerous pleasure boats, had dried up, grown over with grass, and now pastured with cattle; and that the Cottonwood *tree*, the initial point was situated in the San Vicente plains — loosing sight altogether of Cottonwood Lake. (Laguna del Alamo) — A Cottonwood tree can grow as well in the dry plains, as cattle can pasture in three fathoms of salt water, and no better —

We filed in the case the Map of San Vicente y Santa Monica, by which the final decree of confirmation was made. This Map was made in May 1843, by J. J. Warner, Surveyor by the directions of this same Manuel Dominguez then Prefect, under the eye of Governor Michelterranos, for the double purpose, of settling adverse claims to Sepulveda's land, and to give him Juridical possession anew — That Map shows the Cottonwood Lake (Laguna del Alamo) and loma colorado, on the line "Sanjones", to be the East line of Sepulveda's land, besides other natural objects, not designated on Ballona Map — It also shows in the South West corner, a dotted line with writing by it "that Machado claims, from this line to South East Stations, for which he has no juridical possession" — here the identical M. Dominguez, who gave Machado juridical possession in 1839, declares in 1843, that Machado has no juridical possession of the piece of land he grabbed in Hancock's Survey, and now under these exceptions, is the only subject of controversy —

For years, the U.S. Surveyor General J. R. Hardenburgh admitted that the two Maps of these adjoining Ranchos made by the same Alcalde (Domingues) three years apart, and both describing the same natural objects along the partition boundary line, should be taken together in the determination of this Survey, and engaged most Solemnly that both Surveys should be sent on to-

gether, as Sepulveda's was made in July 1868, and retained under the pretext that the "Boca de Santa Monica" finally confirmed in 1859, and not yet surveyed, encroached on the Sepulveda Survey, though the Act of July 23rd, 1866, was known to him —

About November 1871, General Hardenb[illegible]gh sent C. R. Hopkins here at our expense. He in the presence of seventy witnesses, went along the line of the two Ranchos, sketching the natural objects; to wit: — "Laguna del Alamos" — Loma Colorada, and in fact, all those described on the two Maps: — If he made a report, I don't know it, the decision makes no reference to it; —

Hopkins on looking on this inner Bay said, "What a beautiful Sheet of Water this Ballona Bay is" — without regard to the Mexican affidavits.

In conclusion we ask —

1st That the Map used exclusively as the description of the Grant by the Mexican Government may be used as the inflexible evidence in the determination of this Survey —

2nd Should any variance appear in the Juridical possession from the Grant as described by the Map, that the former may be made to yield to the latter, as an Alcalde could not alter the Governor's Grant;

3rd That the Map of San Vicente y Santa Monica, filed in this case, may be referred to for the purpose of corroberating the East line of the Ballona Grant and Map.

Respectfully submitted

S. Haley & J. D. Sepulveda
in propia personas

Los Angeles June 9, 1873

Letter from C. Delano

DEPARTMENT OF THE INTERIOR

Washington, D.C.
November 19, 1873

Sir:

I have examined the papers in the matter of the Rancho Ballona, Los Angeles California, on appeal from your decision of April 30, 1873.

The claim of the grantees was duly confirmed by metes and bounds by the District Court, and this decree of that tribunal became final by dismissal of an appeal to the Supreme Court. A survey of the ranch was made in 1858; said survey was approved by the Surveyor General, was readvertised under the act of 1864, and having been approved by you, now comes before the Department upon an appeal by the owners of the Rancho San Vicente y Santa Monica, who allege that the northern (or northwestern) boundary of the Ballona, as surveyed, overlaps the southern (or southwestern) boundary of the rancho San Vicente as confirmed to the claimants thereof.

The facts in the case and the depositions of witnesses relative to controverted questions, are substantially and correctly recited in your decision, from which it appears that the weight of evidence establishes the correctness of the survey now before me, in its location of the northern (or northwestern) line of the Ballona, according to the decree of confirmation. That decree establishes the boundary in question from point to point by reference to natural monuments, and I am satisfied that these monuments are correctly located by the Hancock survey.

I therefore affirm your decision and return herewith the papers transmitted with your letter of August 12, 1873.

Very Respectfully

C. Delano
Secretary

Hon. Willis Drummond
Comr. Genl. Land Office

United States Patent for Rancho La Ballona

The United States of America
To all to whom these presents shall come
Greeting:

Whereas it appears from a duly authenticated transcript filed in the General Land Office of the United States that pursuant to the provisions of the Act of Congress approved the third day of March One thousand eight hundred and fifty one entitled "An Act to ascertain and settle the Private Land Claims in the State of California" Augustin and Ignacio Machado and Felipe and Tomas Talamantes as claimants, filed their petition on the second day of October Anno Domini One thousand and eight hundred and fifty two with the commissioners to ascertain and settle the private land claims in the State of California sitting as a Board in the City of Los Angeles in which petition they claimed the confirmation of their title to a tract of land known by the name of "Ballona" situate in the County of Los Angeles and State aforesaid said claim being founded on a Mexican Grant to Augustin and Ignacio Machado and Felipe and Tomas Talamantes made in the twenty seventh day of November A.D. One thousand eight hundred and thirty nine by Juan B. Alvarado then constitutional Governor of the Department of the Californias.

And whereas the Board of Land Commissioners aforesaid on the fourteenth day of February Anno Domini, One thousand eight hundred and fifty four in the cause entitled "Augustin Machado, Ignacio Machado, Felipe Talamantes and Tomas Talamantes vs. the United States" rendered a decree of confirmation in favor of the claimants which said decree or decision having been taken by appeal to the District Court of the United States for the Southern District of California the said District Court at its December Term 1855, in the cause entitled "Augustin Machado et al Appellees ads. The United States appellants" rendered its decree as follows to wit:

It is ordered adjudged and decreed that the said decision be confirmed and it is further ordered adjudged and decreed that the claim of the appellees to a certain tract of land in Los Angeles County west of the City of Los Angeles about three leagues and bordering on the sea shore called Ballona is valid, that the said tract of land being the same and for the last 18 or 19 years occupied by the appellees and bounded as follows viz. Beginning at a cottonwood tree at a considerable distance from the house of said rancho which is marked with hatchet cuts, thence running east 7835 varas to a little pole bridge thence south 9800 varas to the mouth of a creek (Estero). Thence west along the sea coast 7300 varas to the deep gullies (barrancas) thence northerly 7800 varas to the place of beginning reference for a more particular description being had to the grant map and judicial possession on file in the case.

And thereafter a stipulation having been made by the attorneys of the parties in interest that appeal in this case would not be prosecuted to the Supreme Court of the United States and filed in the aforesaid District Court. The said District Court at its December Term A.D. 1856 ordered adjudged and decreed That the order granting the appeal to the Supreme Court be revoked and that the decree of confirmation heretofore made by this Court in the said cause to wit: On the 19th day of December A.D. 1855 be and the same is now hereby made final. Whereby the proceedings Court upon title became final.

And whereas under the 13th Section of Said Act of 3 March 1851 and the supplemental legislation and in accordance with the proceedings had pursuant to said act and supplemental legislation there has been deposited in the General Land Office a return with the descriptive notes and plat of survey of the said claim confirmed as aforesaid authenticated by the signature of the United States Surveyor General for the State of California which descriptive notes and plat of survey are in the words and figures as follows to wit:

U.S. Surveyor General's Office
San Francisco, Cal.

Under and by virtue of the provisions of the 13th Section of the Act of Congress of the third of March 1851 entitled "An Act to ascertain and settle the private land claims in the State of California" and of the 12th Section of the Act of Congress approved on the 31st of August 1852 entitled "An Act making appropriations for the civil and diplomatic expenses of the Government for the year ending the 30th of June 1853 and for other purposes" and whereas the U.S. District Court for the Southern District of California rendered a decision whereby it recognized and confirmed the title and claim of Augustin Machado *et als.* to the tract of land designated as the Ballona in Los Angeles Co. as appears from the certified copy of the final Decree of the said District Court a copy of which is hereto annexed. The said tract of land was surveyed in conformity to the grant thereof and the said decision, And I hereby certify that the accompanying map is a true and accurate plat of the said tract of land as appears by the field notes of the survey thereof made by Henry Hancock, Deputy Surveyor under the direction of this office which having been examined and approved remain of record therein, said tract of land is described in the words and figures following viz.

Beginning at a pile of rubble rocks each some nine inches in diameter on a high conical hill being the north western terminus of a range of hills on the east.

Thence according to the true meridian the variation of the magnetic needle being thirteen degrees thirty minutes east, south twenty one degrees fifteen minutes east, ascending the ridge eighty chains to the top and along the same one hundred and seven chains and twenty one links to a sandstone rock, twenty one inches in diameter and two small rocks. Station.

Thence south forty eight degrees thirty minutes west one hundred chains to the base of hills one hundred and eight chains to the base of a spur from the east. One hundred and twenty five chains to a stake on a spur from the north east about four chains south of a lake of water some fifteen chains long and five chains wide. Station.

Thence south twenty three degrees forty five minutes west, at one chain and fifty links crosses a road, course east four chains to a stake. Station.

Thence south seventy six degrees thirty minutes west, at three chains enters the mouth of a cañada from the north east, at three chains and fifty links crosses a stream fourteen links wide course south eight chains and eight links to a stake and charred stake at intersection with the east boundary of Township Two, south range fifteen west eleven chains and fifty links north of a quarter section corner on the east boundary of section twenty four, twenty five chains across a cañada to the north base of hills thirty four chains and eight links to a large rock, the original corner and. Station.

Thence south twenty four degrees forty five minutes west thirty two chains to a stake on the north west base of the hills. Station.

Thence south seventy two degrees thirty minutes west along the base of hills thirty two chains and thirty three links to a stake. Station.

Thence south sixty six degrees, thirty minutes west along the north base of hills nineteen chains and sixty two links to a stake at the north east corner of a decayed corral. Station.

Thence south sixty four degrees fifteen minutes west nineteen chains and fifty links to a stake at base of hills. Station.

Thence south fifty four degrees thirty minutes west, five chains to a point opposite the south east head of a Bay twenty three chains to a stake on the west base of the hills thirty links east of the Bay station, from which the average bearing of the north east shore of the Bay is about north west, and at one hundred chains the Ballona creek discharges itself into the Bay.

Thence south nine degrees forty five minutes west, seventeen chains to a stake on the east base of hills, six chains from the east shore to the lake. Station.

Thence south fifty three degrees west seventeen chains and thirty three links to a stake eight links east of the Bay shore at the north base of hills. Station.

Thence north eighty one degrees west six chains to a stake sixty links south of the Bay shore. Station.

Thence north fifty two degrees forty five minutes west fourteen chains and fifty links to a stake on the shore of the Bay. Station.

Thence south seventy three degrees west eight chains to a stake. Station.

Thence south twenty eight degrees forty five minutes west five chains to a stake fifty links from the shore of the Bay. Station.

Thence south sixty degrees forty five minutes west twenty one chains to a stake. Station.

Thence south eighty two degrees thirty minutes west seven chains to a stake on the north base of high hills. Station. from which a pass in the said hills bears north eighty eight degrees forty five minutes west.

Thence south fifty two degrees west fifteen chains to a stake at north base of high hills. Station.

Thence south eighty two degrees west ten chains to a stake at the edge of Bay. Station.

Thence south sixty degrees forty five minutes west eight chains to a stake at the north base of high hills and on the shore of Bay. Station.

Thence south fifty degrees forty five minutes west nine chains to a stake. Station.

Thence south forty three degrees fifteen minutes west at eleven chains and fifty links leaves the shore of the Bay and enters sand hills eight and ten chains wide extending far to the north west nineteen chains and fifty links to a stake station at the east shore of the inlet from which the east shore of the inlet ranges north, twenty degrees west. The inlet for about one hundred and thirty chains is from eight to ten chains wide.

Thence south forty five degrees nine minutes west, eight chains and twenty one links to a stake and charred stake station on the west shore of the inlet.

Thence north twenty five degrees thirty minutes west forty three chains to a stake at high water mark on shoal water bay of the Pacific Ocean. Station.

Thence north twenty five degrees forty five minutes west sixty five chains to a stake at high water mark. Station.

Then north thirty five degrees thirty minutes west one hundred and sixty chains to a stake at high water mark. Station.

Thence north thirty nine degrees thirty minutes west thirty chains to a stake. Station.

Thence north forty one degrees thirty minutes west thirty chains to a stake at high water mark. Station.

Thence north thirty seven degrees fifteen minutes west six chains to a stake at high water mark. Station.

Thence north sixty two degrees west one chain and fifty six links to a post opposite the mouth of the first barranca or gully being the north west corner of this rancho. Station.

Thence north forty nine degrees east two chains to base of southerly side of barranca with an average of one chain wide and the banks about thirty feet high coming from the north thirty eight chains to a stake in the pile of rocks on the high rolling table land extending south east for the distance of about one mile and terminating in low table land and bordering on the Ballona Bay which bay has its terminus at a distance of about one hundred chains south east from this point. Station.

Thence north fifty seven degrees one minute east one hundred and fifty two chains and ninety one links to four large rocks. Station.

Thence north fifty nine degrees east eighty chains and twenty four links to a point at intersection with the south boundary of section thirty four in Township One south

of range fifteen west, nineteen chains and ninety three links west of the quarter section corner eighty two chains and fifty links to a road, course west one hundred and twenty six chains and sixty four links to three large rocks each fifteen inches in diameter. Station.

Thence north fifty nine degrees and thirty minutes east fifty two chains to the rocks each eighteen inches in diameter. Station.

Thence north sixty three degrees east two hundred and forty one links to a stake being the most northerly corner of this ranch and station from which a willow tree twenty four inches in diameter bears south eighty degrees east distant three hundred and thirty two links (being a point agreed upon as the point where the alamo or cottonwood tree formerly stood).

Thence south fifty seven degrees thirty minutes east thirty nine chains opposite to and two chains east of a dry bed of a lake ten chains from east to west and three chains from north to south forty four chains and fifty links to a point cutting the south east corner of the lake at sixty two chains and fifty links crosses a road course east ninety chains to the center of a ravine thirty feet deep ninety six chains to a stake and charred stake at intersection with the south boundary of section thirty six in Township One south of range fifteen west, twelve chains and fifty eight links west of quarter section corner one hundred and thirteen chains and fifty six links to a stake and charred stake one hundred and fifty links north of a bunch of tunas. Station.

Thence south fifty four degrees forty five minutes, east forty five chains and seventy nine links to a stake and charred stake at intersection with the west boundary of Township Two, south of range fourteen west thirty six chains and seventy five links south of the north west corner of said Township, eighty six chains and fifty nine links to a rock two and one half feet long eighteen inches wide and twelve inches thick imbedded in the earth being an original corner station, and

Thence south fifty nine degrees thirty minutes east nine chains and fifty links to timber at eleven chains and fifty links, crosses a stream of water eighteen links wide skirted with sycamore trees course south west at eighteen chains and fifty links crosses a road course southwest to base of hills some three hundred feet high and leaves timber, thirty eight chains and eighty one links to the place of beginning containing thirteen thousand nine hundred and nineteen acres and ninety hundredths of an acre and being designated upon the plat of the public surveys as lot numbered thirty seven in Township One south of range fifteen west lot numbered thirty seven in Township Two south of range fifteen west of the San Bernardino meridian.

In witness whereof I have hereunto signed my name and caused the seal of the said office to be affixed at the city of San Francisco this Twenty third day of November A.D. 1873.

J.R. Hardenbergh
U.S. Surveyor General
for California

[MAP]

Now know ye that the United States of America in consideration of the premises and pursuant to the provisions of the Act of Congress aforesaid of 3rd March

1851 and the legislation supplemental thereto have given and granted and by these presents do give and grant unto the said Augustin Machado et al and to their heirs the tract of land embraced and described in the foregoing survey but with the stipulation that in virtue of the fifteenth section of the said Act neither the confirmation of this said claim nor this patent shall affect the interests of third persons.

To Have and to Hold the said tract with the appurtenances unto the said Augustin Machado et al and to their heirs and assigns forever with the stipulation aforesaid.

In testimony whereof I Ulysses S. Grant, President of the United States have caused these Letters to be made Patent and the seal of the General Land Office to be hereunto affixed:

Given under my hand at the City of Washington this eighth day of December in the year of our Lord One Thousand Eight Hundred and Seventy Three and of the Independence of the United States the ninety eighth.

By the President U. S. Grant
By S. D. Williamson, Secretary

L. K. Lippincott
Recorder of the General Land Office
Recorded Vol. pp. 484 to 493 inclusive.

A full true and correct copy of the original recorded at request of Francisco Machado January 26th 1874 at 50 min. past 10 a.m.

A. W. Potts, Recorder
By C. W. Gould, Deputy

Letter from J. R. Hardenbergh

U.S. Sur. Genls. Office
San Francisco Dec. 18th 1873

Hon. Willis Drummond
Comr Gen Land Office
Washington, D.C.

Sir:

In the matter of the survey of the Rancho of "La Ballona" finally confirmed to Augustin Machado et al. I beg leave to make the following report.

This Rancho was granted on the 27th day of November 1839 by Manuel Jimeno Acting Governor of California to Augustin and Ignacio Machado and Felipe and Tomas Tallamantes with the following description of boundaries: on the East by the Rancho of Policarpio Higuera; on the North by that of the citizen Alanis; on the West by that of Antonio Ignacio Abila and on the South by that of Jose Sepulveda: the extent being that shown by the Diseño. On the 31st of December 1839 Juridical possession was given of the Rancho (for description of boundaries fixed in giving possession see translation of Record thereof herewith transmitted).

The final decree of confirmation describes the land as follows: Beginning at a cotton wood tree at a considerable distance from the house of said Rancho which is marked with hatchet cuts; thence running East 7835 varas to a little pole bridge; thence South 9800 varas to the mouth of a creek (Estero) thence West along the sea coast 7300 to the dry gullies (Barrancas) Thence Northerly 7800 varas to the place of beginning, reference for a more particular description being had to the Grant map and juridical possession.

Under this decree the survey under consideration was executed in 1858 and sent to Washington before the passage of the Act of June 1860. This survey was rejected by the Hon Commissioner for the reasons set out in this letter to the Surveyor General of March 17th, 1860:

Subsequently by instructions from the Department the survey was advertised under the Act of July 1st, 1864, this letter of instructions dated November 30th, 1868, directing the Surveyor General to report his opinion on the survey having special reference to the point of objection presented in the communication from the Department of March 17th, 1860.

Referring to the points of objection set out in the letter of the Hon. Commissioner of Mareh 17, 1860 we are satisfied that he was misled from the true facts of the case by some of the features of the map of the survey before him — that portion of the map marked "Inner Bay" he evidently considered as a portion of the sea and not included in the Diseño, he therefore directed this portion to be executed. By referring to the original Diseño it will be seen that the word "Estero" is found written on the same near the sea shore: this I take to be the same place as that marked on the map of survey "Inner Bay," which is formed by the waters of the Ballona Creek and is increased or diminished in extent as the outlet of the same to the sea is more or less choked by the beach sands.

The Hon Commissioner directed certain other changes to be made which if now carried out would encroach upon patented ranchos which lie to the North East and South East of the Rancho.

There are no contests with this survey except as to one line that is the North Western boundary which divides it from the Rancho of San Vicente which is not yet in a condition to be sent up.

The survey of the San Vicente adopts the North Western boundary of the Ballona against which the owners of the said San Vicente protest claiming to go farther to the East thereby encroaching considerably on the survey of the Ballona Rancho.

Henry Hancock who made the survey swears that the line in question was pointed out to him by Jose Del Carman Sepulveda and Juan Maria Sepulveda two sons of Francisco Sepulveda Confirmee of the Rancho San

Vicente; that this line was agreed to by the owners of both Ranchos and this statement of Hancock is sustained by the affidavits of several aged witnesses.

In view of the order of the Hon Commissioner for an amendment of the survey unless good cause be shown to the contrary, I have not thought it necessary to discuss the voluminous testimony filed in the case as to the line dividing this Rancho from that of San Vicente. I have thought proper however to send up all the papers necessary for the issuance of the patent, so that in case the Hon Commissioner should think that the objections set forth in letter of the 17th of March 1860 are not tenable the survey may be in a condition to be patented.

All of which is respectfully submitted.

Very Respectfully
Your Obt Servt.

J. R. Hardenbergh
U.S. Sur Genl
for Cala

Letter from G. Howard Thompson

San Francisco, Cal
December 19, 1873

Hon J. R. Hardenburgh
U.S. Surveyor General,
San Francisco.

Sir,

I beg leave to inform you that I am the authorized Agent, and Attorney of the Claimants, to receive, and receipt for the patent to the Rancho "La Ballona" in Los Angeles County, Augustine Machado, et al, Confirmees, and I respectfully request that you will not deliver said patent to any other person. I was employed by the owners of said Rancho to attend to obtaining said patent, and at their request employed attorneys in Washington at great expense to attend to the case before the Interior departments there.

Very Respectfully
Your Obt Servt

G. Howard Thompson

Western Union Message Blank

No. 1.

THE WESTERN UNION TELEGRAPH COMPANY.

The rules of this Company require that all messages received for transmission, shall be written on the message blanks of the Company, under and subject to the conditions printed thereon, which conditions have been agreed to, by the sender of the following message.

JAS. GAMBLE, General Sup't, San Francisco. } 10-1 { WILLIAM ORTON, President, G. H. MUMFORD, Secretary, } New York.

Los Angeles Cal 20 1873

Received at San Francisco, Dec 20 18 1010 AM,

To G. Howard Thompson
534 Cala

We constitute G. Howard Thompson our Attorney to receive from the United States Surveyor General for California the patent for Rancho La Ballona in Los Angeles County and receipt for the same witness our hands this twentieth December eighteen hundred seventy three.

John D Young,
Ramo S Machado
Andres Machado,
Francisco Machado,
Dolores Machado,
Rafael Machado,
Rita de Aguilar,
Ygnacio Machado

54 Paid smo

Letter from G. Howard Thompson

San Francisco Cal
Dec. 22d 1873

Mess, Britton, & Gray,
Washington, City,

Gentlemen,

Your favor of the 12th inst. was received today. The patent to the Rancho "La Ballona" has also been received by the U.S. Surveyor General, but he refuses to deliver it on account of a protest having been filed against its delivery by Col. C. H. Larrabee who claims the right as attorney of the Claimants to receive it; although he can show no written authority to that effect, while I have filed with the Surveyor General a power of Attorney signed by all the present owners of the Rancho, empowering me to receive, and receipt for the patent, and besides I had quantities of evidence in the shape of correspondence with the owners, and their agent in Los Angeles showing me to be the proper party to deliver the patent to, but not withstanding all this, Hardenburgh refuses to deliver it to me, and has refered the matter to the commissioner. You will please attend to the same before him, and see that Hardenburgh is severely reprimanded by him, for such high handed conduct as wilfully and deliberately disobeying the orders of his superior officer. He is ordered to deliver the patent to the parties entitled to receive the same. I file a power of Attorney signed by all the owners empowering me to receive the patent and he refuses to deliver the patent to me, and refers the matter to the Department at Washington mearly upon the protest of a party who can show no authority atal in the matter.

Larrabee claims that the owners are owing him a contingent fee of $250 for services in the case before the Surveyor General, and before I took hold of it. If it is justly due him I would do nothing to prevent him from getting it, and know as soon as the claimants can be communicated with that they will pay him if they owe him

any thing. But let the Commissioner give old Hardenburgh one more slap in the face, before he goes out, which he clearly deserves. I am very sorry that this will delay me from sending your contingent fee in the case, as under my agreement with the owners I can not collect it until the delivery of the patent.

Hardenburgh promised to send a copy of the power of Attorney from the Claimants of the Rancho to me, to the Commissioner I wish that you would see that he has done so, in haste.

Yours very truly

G. Howard Thompson

Letter from Charles H. Larrabee

San Francisco.
Dec 22, 1973

Sir.

I have called upon you this day and asked you to deliver me the Patent in the Case of La-Ballona, as the attorney of the confirmees. I am met by a letter addressed you by Mr. G. Howard Thompson claiming to be the only authorized Agent of said Confirmees & their grantees. For the first time has it come to my knowledge that Mr. Thompson, or any one save myself, has been authorized to act as Attorney in this Case. I certainly have never been notified of such fact by any one.

By the records of your office you will see that I alone filed a brief in the case, and you will remember that I called upon you during the last spring, and upon my solicitation you took up the case, and upon examination decided it in favor of my clients the confirmees. I also advised with Mr Henry Beard of Washington, who had theretofore been acting as the Attorney of the Confirmees before the Dept. I have also shown you to-day my written contract with the Confirmees & their grantees, by which they contract to pay me $250, balance due for my services "when the patent for said Rancho shall be issued by the U. S. Government."

You will also bear witness that I have promptly and faithfully prosecuted this case in your office. This unexpected and unknown substitution of Mr Thompson, I can regard only as an attempt to postpone or deprive me of my just reward. I therefore respectfully request that the Patent be retained until opportunity be afforded to refer the case to the Hon the Commissioner of the Genl. Land Office.

I am Sir
Very Respectfully Yours

Chas. H. Larrabee
Atty for Confirmees

Hon. J. R. Hardenbergh
U. S. Surveyor Genl,
San Francisco.

Letter from J. R. Hardenbergh

U. S. SURVEYOR-GENERAL'S OFFICE,
San Francisco, Decr 22 1873.

Hon Willis Drummond
Comr Genl Land Office
Washington D.C.

Sir:

I have the honor to acknowledge the receipt of the patent of the Rancho "La Ballona." It appears that the claimants are represented by two different Attorneys, and each claims the patent.

I have declined to deliver the patent and forward the letters filed by the claimants Thompson and Larrabee for your decision.

Very Respectfully
Your Obt. Servt.

J. R. Hardenbergh
USSurv Genl Cala

Letter from Britton & Gray

H. T. Britton H. S. Gray

BRITTON & GRAY,
ATTORNEYS AT LAW,

Procure titles from the United States to agricultural, mineral and grant lands.

No. 509 Seventh St., May Building

Washington, D.C. Decr. 31st, 1873.

Hon. Willis Drummond
Commissioner of General Land Office

Sir: we herewith submit letter to us from Mr. G. Howard Thompson of San Francisco, Cal. stating the facts relative to refusal of Ex-Surveyor General Hardenburgh to deliver to Mr. Thompson the patent of the "Ballona" Rancho. Said refusal is so absolutely indefensible, that we have to ask you to forthwith instruct the Surveyor General of California to deliver the patent in accordance with the Power of Attorney filed with him. Clearly neither you nor he have authority to adjudicate the fees of Mr. Larrabee.

Very Respectfully
Yr. Obdt. Servts

Britton & Gray

Excerpts from Las Siete Partidas

TITLE XXVIII.

Concerning the Property Over Which a Man Can Exercise Ownership, and How He Can Obtain This.

A man obtains or loses the ownership of property not only by the decisions of judges, of which we have spoken in the preceding Title, but also in many other ways, which we shall show in the laws of this Title. For this reason we desire to explain here what such ownership is; how many kinds there are; and over what property a man can obtain it, and over what he cannot.

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LAW III.

What Those Things Are Which Belong in Common to All Creatures.

The things which belong in common to the creatures of this world are the following, namely; the air, the rain-water, and the sea and its shores, for every living creature can use each of these things, according as it has need of them. For this reason every man can use the sea and its shore for fishing or for navigation, and for doing everything there which he thinks may be to his advantage. If, however, a house, or any other edifice whatsoever, is found upon the sea shore, it should not be torn down or used in any way without the permission of the party who built it, or to whom it belongs; although if the sea or any person should demolish it, or it should fall down, anyone whosoever can erect a new edifice in that same place.

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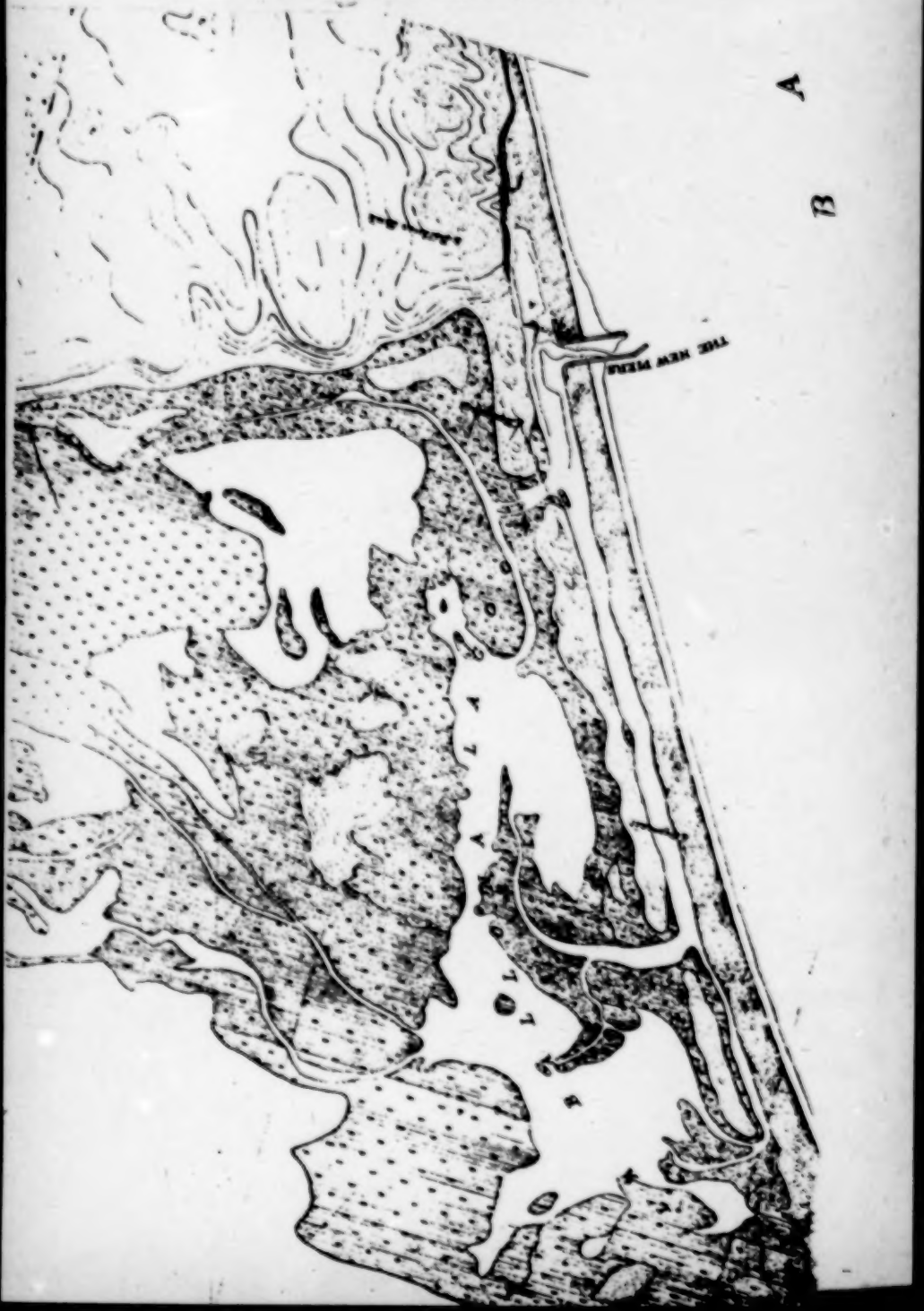
LAW VI.

Every Man Has a Right to Make Use of Harbors, Rivers, and Highways.

Rivers, harbors, and public highways belong to all persons in common, so that parties from foreign countries can make use of them, just as those who live or dwell in the country where they are situated. And although the banks of rivers are, so far as their ownership is concerned, the property of those whose lands include them, nevertheless, every man has a right to use them, by mooring his vessels to the trees, by repairing his ships and his sails upon them, and by landing his merchandise there; and fishermen have the right to deposit their fish and sell them, and dry their nets there, and to use said banks for every other purpose like these which appertain to the calling and the trade by which they live.

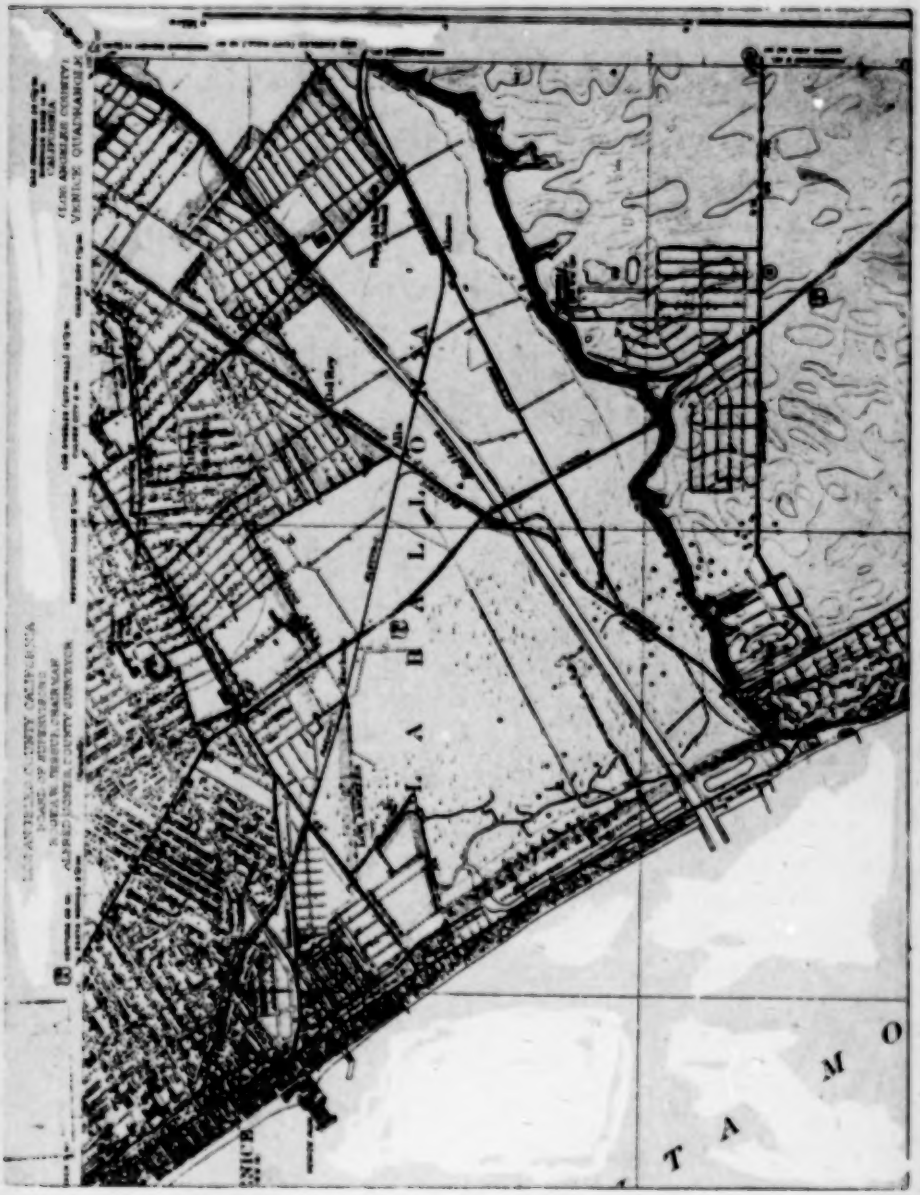
United States Coast Survey Topography from West Beach to Vicinity of Santa Monica, California, 1876

United States Coast and Geodetic Survey, Topographical Sketch of the Proposed Harbor of Port Ballona, Los Angeles, California, 1887



United States Geological Survey, Department of the Interior, Redondo Sheet, Los Angeles County, edition of 1896

United States Geological Survey, Department of the Interior, Venice Quadrangle, Los Angeles, edition of 1934.



Trial Testimony of Antony Ronald Orme

[*197] *ANTONY RONALD ORME,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

THE CLERK: Please be seated and spell your name for the record.

THE WITNESS: Antony Ronald Orme, A-n-t-o-n-y, R-o-n-a-l-d, O-r-m-e.

DIRECT EXAMINATION

BY MR. PARRILLE:

Q Dr. Orme, what is your present occupation?

A Professor of Geography and Chairman of the Department of Geography at UCLA.

Q Are you presently instructing students at UCLA?

A I am.

Q Can you describe your educational background.

[*198] *MR. BITTING: Your Honor, I have an objection on the grounds that we do have a pending motion. I assume from the nature of this man's expertise that this is being offered, at least in part, on the first cause of action of the City's complaint.

I note my objection for the record.

May the testimony be received, since it is a pending motion, subject to a motion to strike at the end of the testimony insofar as it may pertain to the first cause of action.

THE COURT: Yes.

MR. BITTING: Thank you, your Honor.

THE COURT: You were asked, Dr. Orme, to describe your educational background, I believe.

THE WITNESS: Yes. I was educated in England, and I entered in 1954 the University of Birmingham in Eng-

land where I acquired, in 1957, the degree of bachelor of art with first class honors.

I continued in that university and, in 1961, I was awarded the degree of doctor of philosophy in the department of geography at that university for a thesis that concerned the geomorphology of a portion of Southwest England.

THE COURT: I am sorry, I didn't get the word immediately preceding the "of".

THE WITNESS: Geomorphology, g-e-o-m-o-r-p-h-o-l-o-g-y. The study of land forms.

[*199] *Q BY MR. PARRILLE: Can you briefly, Dr. Orme, tell us where you have instructed and what types of courses have you taught.

A From 1960 to 1968 I was an instructor at the National University of Ireland in Dublin, Ireland and I instructed in courses that concerned physical geography, environmental systems and economic geography and related matters, field courses, in particular.

From 1968 until the present, continuing, I have been an instructor at the University of California, Los Angeles. My prime responsibilities there have been to instruct in the areas of, first, geomorphology; secondarily, environmental systems; third, field courses; and, fourthly, in studies of the quaternary.

Q Could you explain to the court what the meaning of quaternary is.

A It is the last episode of geological time in which we still exist. It has been variously dated between approximately one million and three million years of age. The quaternary is a period of the Cenozoic era.

Q Have you initiated any courses at UCLA?

A I have. I initiated a course in environmental systems, in quaternary studies and I have assisted in the initiation of a field course termed ecosystem analysis and conservation.

Q What would be the scope of that course?

A The latter field course, this would be concerned primarily with teaching advanced undergraduate stu-
[*200] dents in the *field, matters pertaining to the nature of environmental systems, systems in which human beings occupy. We refer to these, therefore, as ecosystems in their manifold aspects and these would include elements of earth, water, soil, plants and animals.

THE COURT: Is eco an acronym?

THE WITNESS: It is the same as in economics insofar as it refers, really, to the home, and, therefore, if we are dealing with ecosystems we are really dealing — and in ecology, for instance — we are dealing with the study of home of man. The term "ecosystems" was first introduced in 1935 by the British ecologist, Sir Arthur Tansley.

Q BY MR. PARRILLE: Dr. Orme, do you have any former students who have attained or are working for advanced degrees under your guidance?

A Yes. Since joining UCLA seven students have acquired Ph.D.'s under my guidance and approximately five further students have attained M.A. degrees and some of these are now continuing for the Ph.D. degree.

Of those who have attained Ph.D.'s, in 1971, two candidates acquired Ph.D.'s under my guidance. One of these is now the chief geographer with the U.S. Forest Service in Ogden, Utah.

A second one is an electrogeographer in Ghana.

In 1974, five Ph.D.'s were acquired under my tutelage. These gentlemen are now in universities in various parts of the world. One is in Jordan, one in North Carolina Central University, one in California State University at
[*201] *Northridge and one at the University of Oregon and there is one other somewhere.

Q What is the significance of having students who have attained graduate degrees and have gone on to other levels of instruction?

THE COURT: Significance to whom; what do you mean by "significance"?

Q BY MR. PARRILLE: To the educational or to the academic world.

A We would always hope that those of us who are in the instructional business would instruct students who could advance knowledge further than we can ourselves, otherwise, we are getting nowhere, and this is our ideal. It sometimes falls short of that but the aim is, indeed, to teach students all that you know and then to hope that they will advance the field of knowledge by their studies somewhat further and go into universities and into industry or business themselves and will disseminate the word, as we see it, further afield.

[*202] *Q Thank you.

Have you been employed to do any research projects in your field of expertise?

A Yes, in two capacities. In one capacity as a principal investigator, and in a second capacity as a consultant. I will address both of these independently.

As a principal investigator, I have been retained by the United States Navy, Office of Naval Research, for work that has concerned coastal geomorphology and coastal vegetation studies with a particular view to the use of sensing data in the interpretation of these studies. By sensing data, I mean the use of aerial photography and also imagery that is in the nonvisual wavelengths. I should point out, perhaps, that whereas a few years ago we confined ourselves to photography, aerial photography, that is what we could ourselves see visually, that in the modern sensing we are particularly concerned with using imagery and wavelengths that are beyond the visual. That is, we are particularly concerned with imaging heat and energy in the environment through the use, for example, of infrared imagery which will sense heat and radar, and so on.

In my capacity as principal investigator for the Office of Naval Research, I have used both visual aerial photog-

raphy and also particularly color infrared imagery. This work has been partially concerned with an evaluation of coastal environments along the coast of Southern California and Baja California, and culminated in at least three major reports between the period 1971 and 1973.

[*203] *And then more recently, work that was initiated, indeed, in 1971, and is ongoing at the present time on interpretation and evaluation of coastal environments along the coast of Southern Africa, specifically the coast of Natal, Zulu land, and neighboring areas, Transkei, and Mozambique.

This work was concerned, among other things, with the evaluation, analysis and interpretation of coastal barriers and lagoon systems.

More recently, I have also served as principal investigator for the Coastal Engineering Research Center, which is the coastal research arm of the United States Army Corps of Engineers headquartered in Washington. In this capacity, I have evaluated for them the effects of specific groin configurations on beach geometry and textural characteristics using the experimental groin that was constructed for this purpose on the Point Mugu Naval Station in Ventura, in Southern California, and this involved, amongst other things, collection of data on a daily basis over 128 consecutive days at 25-minute intervals on both sides of an experimental groin from highwater mark to minus 30-foot sea level elevation over 128 days and the subsequent analysis and interpretation of these data.

As a consultant, I have been retained, amongst other organizations, by the Tahoe Regional Planning Agency, and in 1971, first of all, I was retained to do a preliminary analysis of the shores system for Lake Tahoe, California, Nevada.

[*204] *And in 1972, I was further retained to prepare the groundwork for a shore zone plan of Lake Tahoe. This report was submitted in the summer of 1972, passed through a series of public hearings, was subsequently augmented by shoreline ordinance in which I collaborated

with my colleague in the University of Berkeley, Professor Michael Hayman, and this resulting shore zone plan for Lake Tahoe was recently awarded the 1974 Conservation Award by the American Institute of Planners.

I have also served as a consultant to the logging industry in California on matters pertaining to environmental degradation of landscapes as a result of timber harvesting.

I have also served as consultant on a brief basis to a few other organizations.

Q Thank you.

Are you a member of any honorary or professional societies?

A I am a member of the Geological Society of America; the Association of American Geographers; Association of Pacific Coast Geographers; the Institute of British Geographers; and I am a Fellow of the Geological Society of London; as well as other minor organizations.

Q Have you held any offices in any of these organizations?

A I was president of the Association of Geography Teachers of Ireland for four years, and I have served in a committee capacity in some of the other organi-
[*205] zations, including *presently on the Committee of the Marine Studies Group of the Association of American Geographers.

Q Have you had an opportunity to present any professional papers in your field?

A Yes, over the years since I initiated my university career in 1960, I have probably presented 60 to 80 professional papers at conferences and meetings, symposia, in various parts of the world; but primarily in North America, Europe, including the British Isles and Africa.

Q Have you had any books published?

A Yes, I have co-authored two or three books. I have written — I have been solo on one book that was termed

"Ireland" and that was published in 1970 in this country by Alden Ericson in Chicago.

In Britain and in the Commonwealth, by Longman's.

I have also participated or have been one of the contributors to several volumes, including presently a volume that has just been published this month, I believe, on "Coastal Resources Inventory in Prospect", in which I have dealt with the theme of ecologic stress in a subtropical coastal lagoon, particular lagoon being in Southern Africa.

Q Do you have any other books scheduled for publication?

A I am presently writing a book on man as a geologic agent. The role that man has played, in other words, in shaping the earth's surface and, more specifically, in affecting the magnitude and intensity of surface processes
[*206] *such as wave and current action, river action, wind, and so forth.

Q Have you had any research articles published in any scientific journals or books?

A Several articles have been published in scientific articles in books. In all, I suppose approximately 60 items have been published over the years. I would consider about 30 of these to be major items.

In other words, papers of approximately ten pages or more in length as chapters in books or as major articles in scientific journals.

I have had a number of — the remainder are minor items, primarily reviews, abstracts, shorts, summaries of conference papers, and so on.

[*207] *Q In what magazines or reports have these articles been published?

A The Bulletin of the Geological Society of America; The Yearbook of the Association of Pacific Coast Geographers; The Transsection of the Institute of British Geographers; Quarterly Journal of the Geological Society of London; Transaction of the Geological Society of

South Africa; Irish Geography; Geographical Viewpoint, and others.

Q Have you undertaken any reports for agencies of the United States Government?

A Yes, I have. In my capacity as a principal investigator, I have submitted reports to the Office of Naval Research of the United States Navy, and to the Coastal Engineering and Research Center of the United States Army Corps of Engineers.

Q Have we covered all of your published material?

A I think we have a reasonable sample of what I have done.

Q Are you involved in any editorial aspects of publications?

A I serve quite frequently as a reviewer and sometimes as an editor of specific papers, most recently for the Annals of the Association of American Geographers, and the Journal of Sedimentary Petrology.

I have in the past served as an editor on Journal for Geographical Viewpoint from 1965 to 1972.

Q I don't believe you mentioned that you served in any other capacity at the University, or any other
[*208] *activities in addition to your instruction in geography. If so, would you please describe those.

A I am chairman of the Department of Geography at the University of California at Los Angeles.

I am also chairman of the Marine Studies Council at the University of California, Los Angeles; and I have served on a variety of academic senate committees, including being chairman last year of the Undergraduate Student Support Committee.

MR. PARRILLE: If that qualifies Dr. Orme, your Honor, may I continue?

MR. BITTING: Excuse me, qualifies him for what, your Honor?

MR. PARRILLE: As an expert in the field of geography and, I believe, he has defined geomorphology, but I, of course, will ask him to define that more precisely for the court.

[*209] *THE COURT: You may proceed.

MR. PARRILLE: Thank you.

Q Dr. Orme, can you, more precisely, define for the court the term "geomorphology"?

A Geomorphology has its origin in three Greek words: geo, earth; morphus, shape; and logos, study, and it is a word that, in other words, means the study of land shapes. We prefer to use the term "land forms", and, indeed, the study does not stop at that point because to study land forms it is necessary to also study the things that affect shape and mold of land forms. For example, a beach is a land form but one cannot study the beach in isolation from the waves, currents, winds and tides that affect that beach, so the study of land forms or geomorphology implicitly also covers the study of the processes.

THE COURT: Is there a study referred to as the study of earth plates and their movements?

THE WITNESS: There is instructional geology. There is a subcomponent called plate tectonics that has been concerned with the mega structures, the large scale structures of which this earth is composed, specifically, the continental and oceanic plates and their relationship to one another.

We generally refer to that as plate tectonics and it really falls within the general framework of structural geology.

As a geomorphologist I have been involved in this study, specifically, in trying to define, more readily, the deformation that Baja California has experienced as a
[*210] result of *plate tectonics.

Q BY MR. PARRILLE: Were you employed by the City of Los Angeles to make a determination as to the

origin, nature and geomorphology of the area known as Ballona Lagoon?

A I was.

Q Now, to assist the court in formulating your opinion, did you collect a glossary of terms pertinent to your determination and investigation?

A I did.

Q Now, I will ask you a series of terms that you have given to me and I would ask that you define them for the court.

Would you define the term "barrier beach."

MR. BITTING: Is this his definition that is being asked — May I inquire of counsel through the court — his definition or a generally accepted definition or Webster's definition?

THE COURT: I assume that the witness will be asked questions, which questions will incorporate, among other words, barrier beach, and that the inquiry is being made as to the sense in which the witness will be using those terms; am I correct?

MR. PARRILLE: Yes, sir. I can inquire of the witness as to the source of the definition of these terms.

Q Doctor, what is the source —

THE COURT: Well, there is a pending question.

MR. PARRILLE: I will withdraw the pending question.

Q Dr. Orme, what is the source of the terms and the definitions of the terms that you are going to be using?

A It is the glossary of geology which was published
[*211] *by the American Geological Institute and, if I may, I have some notes that will allow me to speak directly to these questions because I compiled up a glossary specifically for this purpose from that source rather than rely on my own interpretation.

Q If you would, sir.

A The complete reference is —

Q I believe I have to ask you this: What is the definition of barrier beach?

A A single, narrow elongate sand ridge rising slightly above the high tide level and extending generally parallel with the shore but separated from it by a lagoon or marsh. It is extended by long shore drifting and is rarely more than several kilometers long.

Q Can you define for us the term barrier island.

A A long, low, narrow, wave built, sandy island representing a broadened barrier beach that is sufficiently above high tide and parallel to the shore and commonly has dunes, vegetated zones and swampy terrains extending lagoonward from the beach.

[*212] *Q Can you give us an illustration of the barrier type island?

A There are several barrier islands along the east coast of the United States and along the gulf coast of the United States, specifically, along the coast of Texas, where these islands lie some distance from the shore. They are islands. They are surrounded by water but run parallel with the shore and, amongst other places, for example, Miami Beach in Florida, lies a barrier island and the Lido in Venice, in Europe, likewise.

Q Can you define for us the term "barrier lagoon"?

A A lagoon that is roughly parallel to the coast and is separated from the ocean by a strip of land or by a barrier reef although this would not be pertinent to the present matters under consideration.

Q Can you define "barrier spit"?

A This is a barrier island or barrier beach that is connected at one end to the mainland.

Q Can you define "creek" and "creek coast"?

A Creek is variously used. In the eastern United States it is used in its derivation from the English term for a small inlet or narrow bay, arm of a sea, generally longer than it is wide and much narrower, extending further into the land than, for instance, a cove.

In Maryland and Virginia the name "creek" was given during the earliest period of English colonization for narrow recesses along the coast.

In other parts of the United States, the term "creek" [*213] *has frequently been given to small, narrow inlets or estuaries of small rivers and sometimes to the rivers themselves, but where given to estuaries or small rivers such usage can be found, for instance, in California, for example, in Napa Creek and Redwood Creek, et cetera.

A creek coast would be a coast that was characterized by such creeks reaching the shore.

Q Can you define the term "lagoon"?

A Lagoon is a shallow stretch of sea water such as a sound or channel, a bay or a lake near or communicating with the sea and partly or completely separated from it by a narrow, low elongated strip of land, generally in the form of a barrier island or barrier beach, so that the shallow stretch of water, itself, is only partially connected with the main body of ocean water.

It has been used in other respects, in other ways, as a shallow, fresh water pond or lake, communicating with a larger lake or river, sometimes used as the shallow body of water enclosed or nearly enclosed within an atoll and the term has, in fact, been widely applied to a variety of coastal features, including estuaries, slews, bayous, marshes and lakes into which the sea flows.

Its etymology is in the Latin word, lacuna, a pit or a pool.

Q Are there any lagoons in California that are prominently known or would be illustrations of this term "lagoon"?

A There are a series of lagoons, specifically, along
[*214] *the coast of San Diego County, that are cut off from the sea, to a greater or lesser extent, by barrier beaches.

Originally, during approximately 100 years ago, there would have been a series of lagoons along the coast of Southern California of Los Angeles County, specifically, for example, behind Long Beach.

Long Beach is, itself, a name after the long barrier beach which would have fronted the lagoon or the mouth of the San Gabriel or Los Angeles rivers at that time.

Newport Beach also fronts a lagoon. Newport Bay.

And as one goes further north in California the area presently under consideration in this particular case — Ballona Lagoon — would have been a similar lagoon of that nature.

[*215] *Q Can you define the term estero? What would be the origin for this definition?

A Estero, an estuary or inlet, especially a marshy estuary, and the term is also used for the land adjoining estuaries inundated by the tide.

The word itself is of Spanish origin, estero, and the Spanish, as with the English estuary, which seem to be comparable, have the origins in the latin word aestus, meaning tide.

Q Can you define the term estuary, then?

A Estuary, the seaward end or widened funnel-shaped tidal mouth of the river valley where fresh water mixes with and measurably dilutes sea water and where tidal effects are evident. For example, in a tidal river.

It may also be a partially enclosed coastal body of water where the tide from the sea meets the currents of a stream from the land.

Q Would there be any illustrations of estuaries in other parts of the world that we might be more familiar with? Give us an example.

A Well, the Columbia River estuary is a major estuary in the Pacific Northwest, for example. Major estuaries, the Amazon, for instance, is a large estuary, a thousand miles wide.

Most major rivers, in fact, in the world, of course, do flow to the sea through estuaries. Sometimes, they are blocked or partially blocked with islands. Sometimes the estuaries are, in fact, very complex and one has deltas
[*216] *forming estuaries as in the case of the Mississippi, due to excessive sedimentary loads, but most rivers do reach the seas through estuaries.

Q In conjunction with the term estuary, can you define the term estuarine?

A It is an adjective that pertains to an estuary. It is often used for deposits accumulated in an estuary environment, and these deposits may be of both mineral and biological origin. In other words, one might have sand, silt or clay, inorganic origin, together with decaying organic debris derived from marshy vegetation growing within such an estuary.

Q Would that also refer to the term estuarine deposit?

A That is also true. Estuarine deposit tends to be characterized primarily by fine-grained sediments, chiefly clay and silt, that would generally be a mixture of both fluvial materials carried down by stream and marine materials carried in by the tide mixed in with a variable proportion of decomposed organic matter.

Q Can you define estuarine lagoon?

A This is a lagoon produced by the temporary sealing of a river estuary by a storm barrier. Such lagoons are usually seasonal and exist until the river breaches the barrier. They occur particularly in regions of low or spasmodic rainfall, such as we have in Southern California.

Q Would you define estuarine salinity.

A Salinity of an estuary varies according to tidal
[*217] *or seasonal conditions. At times, when the lagoon or

estuary is in contact with the open ocean, the salinity may be quite high and may approach 35 parts per thousand.

During periods when the lagoon or estuary may be cut off from the sea by the growth of a barrier beach salinities will be reduced conceivably by the continuing inflow of water from the land, the salinity of stream water, of course, being less than one part per thousand.

At the same time, if that water then is allowed to evaporate in such a lagoon, salinity may, in fact, increase as a result of the evaporation of the water content and the concentration of chlorine and other salts, and this will promote salinity and rise to over sea water values, giving rise to salt flats, saline deposits, and giving rise also to highly saline vegetation, salt marsh plants, and so forth. And it is possible in such environments to have excessively high salinity developing during summer months when water in such lagoons may also entirely evaporate leaving salt encrusted pans.

This may occur along the coast and also inland, and I know of estuaries certainly in Baja, California, or lagoons, rather, in Baja, California and Africa, where salinity is in excess of 100 parts per thousand or ten percent have been achieved as a result of evaporation, so the salinity of an estuary environment is a highly variable thing.

Q Can you define a salt marsh?

[*218] A Salt marsh is an area of vegetation that occupies *flat or poorly drained land subject to periodic or occasional overflow by salt water, water that is brackish, too strongly saline, and promotes a thick mat of grassy halophytic plants. These are plants that are adapted to saline conditions.

Typical salt marsh would be, for example, a coastal marsh that was periodically flooded by the sea, or an inland marsh or salina in an arid region subject to intermittent overflow of water containing a high content of salt.

The term is often used synonymously with tidal marsh or marine marsh along the coast.

Q Can you define the term tidal creek?

A This would be a relatively small inlet or estuary that is subject to tidal flows.

Q I believe you just mentioned the term tidal marsh. Could you define that for us?

A This is a low, flat marsh bordering a coast as in a shallow lagoon or sheltered bay, formed of mud and of a resistant mat of roots of salt-tolerant plants, and regularly inundated during high tides. In other words, a rather marshy tidal flat.

[*219] *Q Finally, sir, can you define for us the term transgression?

A Transgression is a term that means the spread or extension of the sea over the land and the consequent evidence of such advance, such as marine strata deposited on older deposits. Also, it implies any change such as a rise of sea level or subsistence of land that brings offshore, typically marine environments to areas formerly occupied by nearshore, typically shallow-waters conditions, or that shifts the boundary between marine and nonmarine deposition or between deposition and erosion outward from the center of a marine basin.

Q Would there be any other term that you would use in conjunction with the term transgression?

A We might use the term invasion — marine invasion — and we would sometimes be required to use the common word of transgression, which would be regression, withdrawal of the sea.

The source of my comments, I should like to specify exactly, I have been speaking from terms defined in the "Glossary of Geology" edited by Gary M. McAfee, R. Wolf, which was a publication put out in 1972 by the American Geological Institute, Washington, D.C. The American Geological Institute is, in turn, a blanket

organization for all geological organizations in the United States, and I would consider it a definitive work which all geologists or geomorphologists, I think, would necessarily have to have as part of their library source.

[*220] *Q Did you utilize any other references in preparing the glossary of terms?

A As a person who is working in this field, myself, in the field of barrier beaches, lagoon systems, I have had a great deal of exposure to field situations where these have occurred and I necessarily did refer back to some of my previous papers in this area.

I also produced a series of cross sections of a coastal area that defines these terms specifically with respect to individual profiles. These are materials that I gave to my classes, and I think you have a copy of these.

I have also referred to a variety of works that have concerned the flandrian marine transgression, and I have summarized some of the findings of these works over the past decade in a series of sea level curves that I put together on another chart that I believe you have available.

In addition, with respect to the specific area of Ballona Lagoon and Ballona Creek, I have referred to a paper published by the United States Geological Survey, specifically this is a paper authored by J. F. Poland, A. A. Garrett and A. Sinneott. The geology, hydrology, and chemical characteristic of ground water in the Torrance, Santa Monica area, California. United States Geological Survey, water supply paper, 1461, 1959.

Q Very good, Doctor. I don't think you have defined the term barrier lagoon system.

Can you explain to this court what that would be and how a barrier lagoon system would be formed?

[*221] *A A barrier lagoon system is an environmental complex that comprises a barrier beach or spit or island lying seawards of a body of water, a lagoon or estuary

that is periodically, at least, in connection or contact with the ocean.

A barrier lagoon system is affected both by processes shaping the barrier beach, that is, primarily wind, wave, and current activity along the coast, and by processes affecting streams flowing into the lagoon behind the beach. That is, primarily, surface run-offs and erosion of watersheds behind the coast.

I would consider that Ballona Lagoon and the beach in front of Ballona Lagoon is an example of a barrier lagoon system, albeit substantially modified by human activity.

MR. BITTING: Your Honor, I move to strike everything after "I have considered Ballona Lagoon" on the ground there is no foundation for that testimony, it is not responsive to the pending question or questions which were compounded.

THE COURT: Be stricken on those grounds.

Q BY MR. PARRILLE: Dr. Orme, can you tell us the three ways in which a barrier lagoon system is formed?

A A barrier lagoon system commonly comes into existence following a rise of sea level and the flooding of a portion of a coastal environment. It may come into existence, for example, by the building of beach materials across an estuary, by longshore drift — that is, by more or less horizontal or lateral movement of materials
[*222] across an *estuary. It may come into existence, secondly, as a result of the upward accretion of a submarine bar across such an estuary.

[*223] *It may come into existence, thirdly, during a marine transgression as a result of the upward rolling of a beach into a new position across a valley mouth.

• • •

[*236] *MR. PARRILLE: Your Honor, the clerk has marked a copy of a map as plaintiff's 13. It is a certified copy of

a map entitled "United States Coast Survey Topography From West Beach to Vicinity of Santa Monica, California, 1876."

Q Dr. Orme, can you tell us what that map depicts?

A It shows a portion of Santa Monica Bay extending from approximately the present vicinity of Venice to beyond Playa Del Rey.

It shows in the left center of the map, somewhat south of the middle, somewhat below the middle, it shows an area of symbolism —

Q May I ask that we place the map on the board, and perhaps you can point it out with a pointer.

A Shows an area of Santa Monica Bay along the shore here. North is in approximately that direction, and we are looking west down here towards the open ocean. Along the coast there is an area of symbolism of primarily two types.

One being a stipple that extends from approximately midtown Venice across what appears to be the mouth of Ballona Creek and then continues into the El Segundo sandhills. This symbolism, stippled symbolism, is although not designated in any key, it is thought to refer, as it commonly does on such maps, to the presence of
[*237] sand dunes *along the coast.

Behind the coast, there is an approximately triangular area constituting what I consider to be much of the larger area of Ballona Lagoon, areas of water within this general region, a stippled area for which I have no immediate explanation, which I rather imagine may be mud flat, and then an area shown again with a different type of symbolism, but of a symbolism that is rather typical of the type which would be used to depict salt marsh vegetation within the tidal creek estuary or lagoon or environments.

[*238] *Ballona Creek is shown entering this area and flowing through a series of rather complex channels, through a series of rather larger lagoons and then breaking out into quite a large area and eventually into a continuation of the creek and the lagoon, parallel with the shore, and then exiting through the barrier beach at this point here, more or less under the hills of Playa Del Rey.

The map also shows the barrier beach extending along the seaward edge of the lagoon for several miles to this point.

Q What would be "this point", sir?

A Approximately the present location of Playa Del Rey, extreme southwest corner of the Ballona embayment.

THE COURT: Would you spell the last word, please.

THE WITNESS: E-m-b-a-y-m-e-n-t.

Q BY MR. PARRILLE: Of what assistance is this map to you in helping you to formulate your opinion?

A Maps of this character, including this specific map, are extremely useful in defining the natural environment, the physical environment, prior to the significant human interference with a region.

At the present time, as we well know, the area of Ballona Lagoon has been much adulterated by human activity and in 1876 when this map was drawn, such was not the case, therefore, this map would help to establish the characteristics of the lagoon prior to significant human disruption.

Q Fine.

We offer into evidence plaintiff's No. 13.

[*239] *MR. BITTING: I object on the ground of relevance. The only relevant time is in 1839 when Governor Alvarado granted the land to the Machados and Tala-

manteses, and what was the character of the water on the property at that time.

Q BY MR. PARRILLE: Dr. Orme, to the best of your knowledge —

THE COURT: Are you withdrawing the pending question?

MR. PARRILLE: I would ask a question for foundational purposes.

THE COURT: You may withdraw the pending question.

MR. PARRILLE: I will withdraw the pending question.

Q Dr. Orme, as an expert in the field of geography and cartography would this map represent the general nature of Ballona Lagoon approximately 30 to 40 years previous to the time it was drawn?

A This would be highly indicative of a situation 30 to 40 years prior to that stage, yes.

MR. PARRILLE: I ask that the court accept into evidence plaintiff's No. 13.

MR. BITTING: To which I object on the same ground, your Honor. The only relevant time is 1839 at the time of the grant from Alvarado to the Machados and Talamanteses.

THE COURT: It goes to the weight of the evidence.

The objection is overruled.

It will be received in evidence as plaintiff's 13.

[*240] *MR. PARRILLE: Thank you, your Honor.

Q I have in my hand a certified copy of a United States coast and geodetic survey map, topographical sketch of the proposed harbor port of Ballona, dated December, 1887, marked as plaintiff's No. 14.

Sir, can I ask you to describe what the map denominated plaintiff's 14 would be?

A This shows an area named "Port Ballona" which represents an enlargement, a representation of a portion of the area shown on the previous map at a later date, 11 years later, and is to a somewhat larger scale, also oriented with true north at the top of the map and showing a major portion of the triangular area shown on the previous map as representing Ballona Lagoon.

It shows, again, with characteristic symbolisms a barrier beach or spit extending along here to what are termed the "New Piers" and then continuing across and going south into the Playa Del Rey area.

It also shows sand on the far side of a linear strip of water running parallel with the shore, again, lying on the far side and running parallel with the shore.

Landward of this shows an area designated Ballona Lagoon.

The lettering extending across here are areas of open water and also the term lagoon across areas of salt marsh.

There are also areas along the south side of the lagoon area, at least a symbolism seems to represent sand, areas of open water, again, landward of the main
[*241] shore. Several *areas of open water.

There are also areas shown with subaquatics countouring which are probably rather small ponds and there are a series of channels connecting these.

I imagine that Ballona Creek enters this area — off the map — but, in any case, there are a series of channels running through this region connecting various bodies of water, running into Ballona Lagoon here, and then exiting out of Ballona Lagoon into two positions: One, here, and curving around to the north and then south and then running out also here and running out again to the south along a portion of the lagoon that lies immediately behind the barrier beach.

The New Piers presumably refer to the creation or construction of piers to maintain a harbor entrance or

an inlet through the barrier beach at this point and this, presumably, refers to Port Ballona.

There is some writing in here that does refer to some of the characteristics of a borehole that was put down near the south pier at this point and this borehole penetrated through an area of beach sand into an area of marsh muds, as I interpret it.

Q Does the written description make any reference to any barges or boats located on the lagoon?

[*242] *A I would have to read it. Perhaps I should read the whole of this. Would that be appropriate?

MR. PARRILLE: May the witness read the written legend, your Honor?

THE COURT: Any objections?

MR. BITTING: No objection, your Honor.

THE WITNESS: (Reading):

"Note: The triangulation was executed for the purpose of determining the position of the new piers, and is so extensive because the stations nearest to Ballona Lagoon had been destroyed. All the topography, except the new piers and some slight changes about the entrance to the lagoon, has been approximately enlarged from a tracing on a scale of 1/20,000 of Asst. Chase's work in this locality in 1875.

"It exhibits the entire tidal area of the Lagoon, which the projectors of this new harbor deemed sufficient to maintain a deep water channel between the jetties, with the assistance of dredging to deepen the water in the lagoon.

"On August 29th, when I first visited the place, the dredger had been at work about two weeks in the place marked A. . . " (Witness indicating.) Which is there.

[*243] *". . . and had deposited the material pumped up outside to the southward of the southern jetty at first, but afterwards in the area marked B."

(Witness indicating) Which is there. "It had not yet succeeded in excavating a space sufficiently large to allow it to float and swing at low tide.

"At the date of my last visit, September 19th, the dredger was still at work in the same place, and had made no apparent progress. The channel between the jetties, instead of scouring as it was expected to do, had filled up so as to leave but a narrow channel at low water.

"The low water line exhibited on this sheet was sketched in approximately at low tide from a position on the bluff overlooking the entrance. The piers are of wood, piled like ordinary wharves, but are sheathed on the channel side by square timbers driven into the sand close together and bolted to the piers and to each other.

"To ascertain the character of the formation, a well had been bored at the inner end of the southern jetty. The following is reported to me as the result: From mean high water eight feet of coarse sand; next 14 feet
[*244] of hard, blue *clay in thin horizontal layers; next 26 feet of fine sand; next 32 feet gray mud, soft and mixed with sand; next four feet of blue clay; below this there is gravel and fresh water, and they went no further.

"A well now being sunk near the southern end of the lagoon at the edge of the bluff shows a much different formation. It is a fact that the dredger is boring in clay, which seriously retards the work as the cutter becomes clogged with it."

I think that is pertinent to what you just asked me.

MR. PARRILLE: Thank you, Doctor.

MR. BITTING: Excuse me, may I inquire of the witness one question?

Did you read the last paragraph?

THE WITNESS: I did not.

Q BY MR. PARRILLE: Of what significance would be the results of the bore hole test?

A They show what, in my experience, is characteristically the type of deposits that one finds in barrier lagoon situations close to the shore. When one initially bores down what they are reaching, they are boring down initially through the barrier beach and then penetrating into the muds of the lagoon over which the
[*245] barrier beach has *been built.

They are then extending down through some initial muds into the barrier beach that may have been built up during the marine transgression that brought this into existence, and then they are going down below that again into previous muds of a previous lagoon several score feet below present sea level.

In other words, along the immediate coast in the vicinity of most barrier lagoon systems, one passes through a sequence of barrier lagoon systems that were brought in existence through the flandrian marine transgressions.

Q Of what assistance is this map to you in formulating your opinion?

A Once again, it indicates to me the nature of a barrier lagoon system prior to significant human interference with the area. It is of value in reconstructing the geomorphology of this coastline and it existed prior to the disruption of the lagoon and its barrier that had taken place during the present century.

MR. PARRILLE: We offer into evidence plaintiff's 14.

MR. BITTING: I have the same objection, your Honor. Additional objection is the witness just stated that this map is indicative of what the court can consider or I can consider as significant human interference. They cut a channel into the water, what is apparently the water area, built a couple of piers, and had a dredger in the area of Playa Del Rey.

THE COURT: Same ruling as the court made with respect to plaintiff's 13. Objection is overruled.

[*246] *MR. BITTING: Thank you, your Honor.

THE COURT: Be received in evidence as plaintiff's 14.

[*247] *Q Dr. Orme, I now show you plaintiff's No. 15.

THE COURT: May I interrupt for just a moment, Mr. Parrille?

Dr. Orme, on two occasions, the first with respect to plaintiff's 13 in evidence, that is, the map of 1876 and the second, with respect to plaintiff's 14 now in evidence, the map of September of '87, you were asked whether each of them was helpful to you in forming your opinion — I don't mean to quote verbatim the question put to you — and your answer to each of those questions was "Yes."

To what opinion were you referring?

THE WITNESS: My opinion as to the nature and origins of Ballona Lagoon.

THE COURT: Absent plaintiff's 13 and plaintiff's 14, would you have been able to form an opinion of the nature and origin of Ballona Lagoon?

THE WITNESS: Yes.

THE COURT: Mr. Parrille, I interrupted you at a point when you were out to inquire of the witness with respect to plaintiff's 15 for identification, I believe.

MR. PARRILLE: Yes, your Honor.

Q Turning to plaintiff's 15, Dr. Orme, can you tell us what the origin of this map is?

A This is a map published by the United States Geological Survey of the Department of the Interior of Los Angeles County, specifically, the Redondo sheet of a scale of one inch to approximately one mile, which shows a portion of Los Angeles County flanking Santa Monica Bay and extending from the south end of Santa Monica
[*248] at the northwest end of the map to *Wilmington at the southeast end of the map and including areas of the Palos Verdes Hills, the Segundo Sand Hills and extending up

towards the Baldwin Hills at the mid-north end of the map, including, also, the developing city of Inglewood, at this time, and of Redondo on the coast.

It specifically is pertinent to matters presently under consideration. It shows an area of marsh and beach in the vicinity of Ballona Lagoon — at Ballona Lagoon.

Again, there is a symbolism which is not present on this map, a key which is not shown on this map but, nevertheless, at this time, was being published by the United States Geological Survey separately.

The symbolism would indicate sand hills extending along the shore in South Santa Monica to Port Ballona and then extending further south, behind these sand hills and the sandy beach of this area, again, running parallel with the coast and then an area of salt marsh showing large areas of water connected by the channels, ultimately connecting back to Ballona Creek and to a small extent, also, to Centinela Creek flowing along the southern end of this embayment.

THE COURT: Dr. Orme, will you state the date of the preparation of Redondo sheet, plaintiff's 15, of the United States Geodetic Survey.

THE WITNESS: This edition is of September, 1896 and this was reprinted in 1922.

Q BY MR. PARRILLE: Is there a legend on the back of the map, Dr. Orme, that might assist you?

THE COURT: Assist the doctor in what regard?

[*249] *MR. PARRILLE: Insofar as the symbolism on the map is concerned.

THE WITNESS: Yes, indeed, there is.

Among other things it has a water symbolism, stated "Printed in blue" and if one looks over, then the symbolism for salt marsh is that shown covering the greater part of Ballona Lagoon.

The symbolism for sand and sand dunes is that which characterizes the coast at the mouth of Ballona Lagoon.

Q BY MR. PARRILLE: Of what assistance is this map to you in formulating your opinion as to the origins and nature of Ballona Lagoon?

A Again, it provides evidence of the nature of the lagoon at this point in time and suggests, as did the previous maps, to me, the origins of this lagoon, as a lagoon system developing initially behind a barrier beach or barrier spit.

MR. PARRILLE: We offer into evidence plaintiff's No. 15.

MR. BITTING: I have the same objection, your Honor.

I assume the same ruling by the court?

THE COURT: Same ruling.

Received in evidence as plaintiff's 15.

Q BY MR. PARRILLE: Dr. Orme, I now show you a map denominated as plaintiff's 16.

[*250] *Can you tell us the origin of this map?

A The map published by the United States Geological Survey of the Department of the Interior of a portion of Los Angeles County, specifically the Venice quadrangle published in the edition of 1934 and reprinted in 1942 at a scale of approximately two and a half inches to one mile, or 1 to 24,000.

It covers an area extending from the south end of Santa Monica to the vicinity of Manhattan Beach along the shores of Santa Monica Bay, and extends inland to the vicinity extreme southwest edge of Culver City and covers an area on the coast including Ballona Bay and an area we have referred to in previous maps as Ballona Lagoon. Ballona Creek in this instance now shown canalized.

MR. BITTING: What was that last word?

THE COURT: Canalized, c-a-n-a-l-i-z-e-d.

MR. BITTING: Thank you.

THE WITNESS: And showing also the barrier beach or spit fronting an area designated as Ballona Lagoon

extending south towards Playa Del Rey but interrupted by the canalized Ballona Creek.

It also shows Lake Los Angeles as has been shown on a previous exhibit.

THE COURT: Dr. Orme, did you refer to plaintiff's 16 as United States Geological Survey?

THE WITNESS: United States Geological Survey.

THE COURT: And plaintiff's 15 was a United States Geological Survey or Geodetic?

THE WITNESS: Geological Survey.

[*251] *THE COURT: Thank you.

Q BY MR. PARRILLE: Dr. Orme, what symbolism appears within the area shown as Ballona Lagoon?

A Symbolism here is typical of that used on United States Geological Survey Topographical Maps to designate salt marsh, and it also includes along the coast contours at, I believe, five foot intervals. But anyway, contours showing the character of the barrier beach and the sandy areas, thinned barrier. It does not specifically show sand in symbolism form.

Q Does this map also show the location of the Venice Canals?

A This map shows the location of the Venice Canals, specifically four canals in this area.

It also shows roads existing in an area that was previously in the Venice Canal system, but which by this date, 1934, had indeed been filled in.

Q Does the map indicate that the Venice Canals were linked to the remaining portion of Ballona Lagoon?

MR. BITTING: Object to that, your Honor, the document speaks for itself in that regard.

Also on the grounds that he hasn't laid a foundation you can tell they are on that particular map.

THE COURT: Do you care to withdraw the pending question?

MR. PARRILLE: I will withdraw the question.

Q Does the map indicate the location of the remaining portion of Ballona Lagoon?

THE COURT: Excuse me for interrupting. For the benefit of people who may have occasion to read the
[*252] transcript of the *testimony, would it be convenient for counsel to refer to a map by the name that we have baptized? I imagine you are now referring to plaintiff's 16?

MR. PARRILLE: Yes, we are, your Honor.

Q Dr. Orme, does plaintiff's 16 refer to a remnant of Ballona Lagoon?

A It does.

Q And what is that remnant?

A Ballona Lagoon is here designated as an area of water approximately one mile in length and a few score feet wide running parallel with the shore and inland of the barrier beach immediately along the shore.

THE COURT: When you use the term "score" are you referring to 20?

THE WITNESS: Yes.

THE COURT: 20 feet?

THE WITNESS: 20 feet, yes.

Q BY MR. PARRILLE: Referring again to plaintiff's 16, does the map indicate that there is a body of water connected to Ballona Lagoon?

A It shows a network of channels behind the inner line of sand dunes themselves with small feeder channels and with a canalized channel in this vicinity.

It also shows Lake Los Angeles feeding into Ballona Lagoon, and one must presume from this evidence that these channels here are but a stylized version of a great deal of drainage that would occur from the salt marsh toward the channels and via these channels into the lagoon.

[*253] *Q Of what assistance would be plaintiff's 16 to you?

A It shows the nature of Ballona Lagoon and its barrier beach in 1934 at a time when significant human interference had now begun to modify its orginal characteristics, including the drainage of this lagoon as a result of the canalization of Ballona Creek. In previous maps, we have seen Ballona Creek flowing into the northern end of Ballona Lagoon and its salt marsh and then distributing itself in a rather random network of channels through the lagoon area.

This would clearly impose a significant flood hazard to the marsh as a whole, and perhaps to the surrounding lands and, presumably, the canalization of Ballona Creek was taken in part to convey runoff more rapidly through this area to the sea.

MR. PARRILLE: We offer this map, plaintiff's 16, into evidence.

THE COURT: No objection? Be received in evidence as plaintiff's 16.

MR. PARRILLE: Thank you, your Honor.

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[*264] *BY MR. PARRILLE:

Q Dr. Orme, did you obtain any articles or reports or treatises on the geological subsurface or location of waters in the area adjoining or in Ballona Lagoon?

A Yes, I consulted the previously mentioned work by Poland, et al., on the "Geology, Hydrology, Chemical Characteristics" in the Santa Monica area, which is a geological water supply paper published in 1959, and is a very thick tome.

Q Can you tell us, after reviewing this document, what you were able to learn about the area surrounding
[*265] *Ballona Lagoon or inland?

A The water supply paper in question, by its very name, addressed the matter of water supply in the area, and to do so it had to address the various geological

formations that exist in the subsurface as well as the sources of water on surface and contributing to the subsurface water supplies.

To this end, it therefore described the geological history and structure of this fairly large area extending from Santa Monica to Torrance, and defined a sequence of events based upon bore hole records and other excavation records extended from the earlier part of the Cenozoic era through to the present time.

It did not, in fact, specifically address the origins of Ballona Lagoon but it did address matters that were pertinent to that origin, and I was able, from that data it presented, together with some field work and some interpretation of aerial photography and existing maps, to add further to the history of the lagoon from that basis.

Q Did you chart out the various levels of the sea from pleistocene to helosticene time.

THE COURT: I am sorry — levels of the sea?

MR. PARRILLE: Yes, your Honor, sea levels.

THE COURT: Would you rephrase that question?

Q BY MR. PARRILLE: Were you able to determine various levels of the ocean at sea level from Pleistocene to Holocene time?

[*266] A In an approximate sense, yes. I should add, *perhaps, by way of illustration that the levels of land and sea in the Los Angeles Basin have been extremely varied over the more recent period of geological time and it is important to understand the nature of the sea levels in order to understand how Ballona Lagoon first came into existence. And if I may, I could just address that briefly.

THE COURT: Would you assist me, Doctor? It's been a long time since I studied geology, and you are about to talk about some geological eras.

I remember Cenozoic.

THE WITNESS: Archeozoic.

THE COURT: And Paleozoic.

THE WITNESS: That's right.

THE COURT: Would you give that again, so that I can better follow your testimony.

[*267] *A Well, the Cenozoic is the era in which we presently exist. It has been in existence for approximately 70 million years. The Cenozoic is, in turn, divided into periods and we recognize two periods in the Cenozoic: Tertiary, T-e-r-t-i-a-r-y, which lasted from approximately 70 million years ago until approximately 3 million years ago and, more recently, the quaternary period which lasted from 3 million years ago to the present and is sometimes loosely dubbed "The great ice age", although for this era, it is somewhat irrelevant, the ice age.

The quaternary period is, in turn, divided into epochs, of which there are two: The Pleistocene, P-l-e-i-s-t-o-c-e-n-e which lasted from approximately 3 million years ago to approximately 10,000 years ago and the Holocene, Ho-l-o-c-e-n-e which lasted from about 10,000 years ago to the present time.

Now, as far as Ballona Lagoon is concerned, it is important to recognize that throughout the latter part of the Tertiary period, that is, during the epochs that we know as the Pleistocene, the Los Angeles Basin, including Ballona Lagoon, was under water — substantially under water — under several hundred feet of ocean, and although the record is rather imperfect we know that during the late Tertiary period and the early Pleistocene that sea level came in and out on several occasions but, for the most part the shoreline — the main shoreline — of the continent, at that time, lay to the east of Ballona Lagoon.

During upper Pleistocene times and, specifically, during the last glacial stage which we know in North America
[*268] *as the Wisconsin glaciation because of its characteristic type deposits in Wisconsin, the abstraction of water from the oceans and its piling up on land in the form of land ice as the rather massive sheets — these were particu-

larly the Laurentian sheet of Canada and the northern and central portions of the United States and the large ice sheets of Europe and Asia as a result of this withdrawal of water from the oceans and its locking up as land ice on land. Sea levels fell from approximately its present level to well below present sea level.

In doing so, it probably reached depths of in excess of 300 feet below sea level.

[*269] *Therefore, we have to envisage a Santa Monica Bay during this last glacial stage, shall we say approximately 20,000 years ago — Santa Monica Bay — wherein the bay was much farther west beyond the present coast than it presently is.

Sea level was also lower, perhaps a hundred meters or 300 feet or more lower and, in other words, the shoreline lay well to the west of the present shoreline.

As the last or Wisconsin glaciers began to melt — and we estimate from evidence elsewhere in North America and Europe that this began approximately 20,000 years ago — as the glaciers began to melt so they slowly began releasing this water back into the oceans and ocean level, in turn, began rising.

It was rising against the land and it would, therefore, rise against the Los Angeles basin, against the Santa Monica mountains.

In doing so, it would have infiltrated into any river valleys and other embayments that might have existed in this 20,000 year old landscape.

In doing so, therefore, it began to create embayments along the present coast, flood them with water and then rise through them towards its present sea level stand.

This rising of sea level which accompanied the melting of the last glaciers is known in geological terms as the Flandrian Transgression. It was a rise of sea level that began 20,000 years ago, approximately, and it continued at varying rates until about 5,000 years ago by which stage the Wisconsin glaciers had entirely melted except

[*270] for a few remnants *here and there in the Canadian Arctic and Scandinavian Highlands, and so on.

This Flandrian Transgession was responsible for bringing the coastlines in the world into their present configuration, as we know them, in broad outline. That is, for bringing the sea up against the Santa Monica mountains, roughly along its present line and against the Los Angeles basin, Palos Verdes Hills and other areas, other regions of this area.

One of the features of this transgression was that the sea rose into a broad embayment created during this preceding period of low sea level by the Los Angeles River or its antecedent.

It appears that during the last glaciation, say, 20,000 years ago, the Los Angeles River, at least, for part of the time, flowed out from approximately this area where we are here in the downtown region and just south of the downtown area; it flowed west to what was called or what is now called the Ballona Gap that lies between the Baldwin Hills and the Beverly Hills.

And from the Ballona Gap it continued in a west-southwest direction to, in a broad swathe of flood plain and river deposits, across the present coast in the vicinity of the region betwen Playa Del Rey and Venice or Santa Monica.

This course of this proto Los Angeles River is reflected —

MR. BITTING: I beg your pardon.

THE WITNESS: This course of the proto Los
[*271] Angeles River *is a river that has antecedents. It is a prior river in that area. The Los Angeles River, at that time, is reflected in a very well marked water bearing horizon of sands and gravels, sometimes simply known as the 50-foot gravel because in the Ballona Gap it occurs at a depth of about 50 feet.

Poland and his colleagues, in the water supply paper, a map is shown of the water bearing gravel that traces the

course of the Los Angeles River at that time. They also show that at another time it may have flowed directly south, approximately along its present course to join with the Rio Hondo and with the San Gabriel River before reaching the sea in the vicinity of Long Beach.

One has to understand that rivers in this area, of course, are still subject to greater regularity, that, at, some times there are massive floods and at other times there are periods of prolonged drought. When the floods come down it is possible for streams to occupy any one of a number of courses or, at least, it was until these major rivers of the area were canalized for flood control purposes.

Certainly, when man first occupied — at least when European men first occupied — the Los Angeles Basin one could envisage the Los Angeles River as braiding, rather like the way in which one's veins braid in one's arm and moving all over a flood plain with no well confined channel. Rather, as some of the rivers in the desert now flow across the foothills after a flood.

It has been man who has confined them to more restrictive courses in recent times.

[*272] *During late glacial times a portion of the Los Angeles River, at any rate, flowed west-southwest through the Ballona Gap, north of the Baldwin Hills and out through the present area of Ballona Creek.

In doing so, it cut a valley below present sea level. It was always trying to adjust to a lower sea level somewhere off the coast and throughout the Ballona Gap.

Poland and his colleagues, using their own and prior borehole records, have revealed the continuous trace of this water-bearing stratum.

So, when the sea level rose against the coast it rose, amongst other things, into the river valley that had been created by this proto Los Angeles River and in doing so it was also constrained by certain other physiographic characteristics of the immediate coastal area. It was constrained, for instance, by the escarpment that lies south of the Ballona Lagoon at the present time. It was

constrained by the general configuration of the area and, if I may, I would like to go to some charts that I have prepared that will illustrate this; will that be appropriate?

• • •

[*275] *Q Can you tell us what other documents, maps, or photographs you utilized to assist you in preparing this chart?

A I used the series of United States geological survey topographical maps going back to the original one that I saw in 1896, and some of the earlier coast and geodetic survey charts that we have already entered into as exhibits.

I used a series of aerial photographs, and I also used my own field observations regarding the approximate dimensions of Ballona Lagoon as I would have conceived it coming into existence about 5,000 years ago.

I should point out at this stage that I referred to the flandrian and transgression. This began in late Pleistocene times and continue through into the Heloscene. The Pleistocene-Heloscene boundary occurred approximately 10,000 years, so the transgression is also time-transgressive. It is not Pleistocene or Heloscene. It continued through to about 5,000 years ago.

In doing so, it flooded into this channel that had been carved in part from time to time by the early Los Angeles River, and the early Los Angeles River probably came through in this general area and then buffered against the escarpment and ran out towards the lower sea level at the time.

THE COURT: Excuse me, Doctor, you said probably ran along this general area. You are still referring to plaintiff's 20?

THE WITNESS: Yes.

[*276] *THE COURT: Would you be more specific as far as the record is concerned when you make reference, then,

"In this general area". You might make a grid on plaintiff's 20, if you wish.

THE WITNESS: I prepared these four charts as my concept of how Ballona Lagoon came into existence following this transgression.

On these charts, plaintiff's exhibit 20 and those following, the former area of Ballona Lagoon as originally initiated by the transgression is shown by this approximately triangular area, this right-angle triangle with its right-angle base at Playa Del Rey. This is a highly stylized diagram.

THE COURT: Which right-angle triangle?

THE WITNESS: This one down here.

In other words, one has to envisage that kind of shape. This is a highly stylized diagram. It is not drawn specifically to scale, but the former dimensions of this lagoon were approximately three miles on the seaward end from Venice to Playa Del Rey, approximately three and a half miles from Playa Del Rey, approximately three and a half miles from Playa Del Rey to where Centinela Creek entered the Lagoon, and then approximately four a half miles along the hypotenuse of this triangle, which would have been the northern side of the lagoon.

The Los Angeles River flowed into this general area on the northeast side or hypotenuse side of this triangle, and this line indicated here on exhibit 20 can only be considered an approximate position as to where the river
[*277] *entered, but it then entered somewhere along the hypotenuse and flowed out seaward.

When sea level rose against the land during this flandrian transgression, it rose into part of the river valley that had been carved out by the Los Angeles River and by its tributary, Centinela Creek.

[*278] *It defined this rather striking right-angle triangle because of the preexistence of the Ballona escarpment to the southeast and the line of conspicuous bluffs and

because of the regional slope on the hypotenuse side is one in which all the rivers were draining southwest, south-southwest from the Santa Monica Mountains, from Beverly Hills, Westwood, Brentwood area, draining south-southwest, with the regional slope towards this side, towards the hypotenuse. So, when the sea rose against this, they rose against a sloping plane, sloping into the sea from the north and east.

Plaintiff's exhibit 20 has been designed just to give an indication of what probably occurred immediately following this transgression. A large Ballona Lagoon was initiated. At present, this would have been entirely open to the sea, but almost immediately sea level established, sand began drifting along the shore from the north to build out the beginnings of a barrier spit. Because beach drifting or littoral drift is not entirely from the northeast area at the present time —

THE COURT: Excuse me, littoral, L-i-t-t-o-r-a-l?

THE WITNESS: Yes, because littoral drift is not entirely from the northeast at this time, but also periodically comes from south of west, we also conjecture that there may have been a small amount of sediment building out from the southern side. This is designated on plaintiff's exhibit 20 by the red area that has been stippled.

Within the embayment thus created and the margin of
[*279] this embayment, I have straightened, just for *simplicity's sake, sediments brought down primarily by the Los Angeles River, but to a lesser extent by Centinela Creek, would have begun building out land area into the lagoon.

At first, probably quite rapidly because the entire portions of this lagoon would have been very shallow. One has to foresee an area that shelved up towards the land and, therefore, along its inner margins was very shallow. This material would have been in the form of sand, gravel, but also very much smaller materials in the form of silt and clay building out into the water first as mud flats and then as the mud flats themselves slowly rose above water level, which would have been at that time sea level, so these would have been slowly colonized

by vegetation. Vegetation which would be adaptable to the saline environment of the lagoon.

The Los Angeles River almost certainly bifurcated into a number of contributory channels such as I have shown here, because this is certainly indicated by the charts of the 19th Century as having happened a little later, so it has a number of outlet channels figuring in towards this embayment.

[*280] *And there is also a small amount of back beach deposition in this area because of the lack of adequate escarp by stream or wave action in these areas.

So I think one can conjecture that at about 1,000 years after the termination of the transgression, the transgression terminating about 5,000 years B.P., about 4,000 years B.P. there probably had been deposition in the order of the magnitude shown here.

I then prepared a second chart which will be plaintiff's exhibit 21 to demonstrate what happens next.

Again, these are ball park figures. They are conjectural and I am prepared to defend them as an academic.

With sea level stable and with sediments being contributed to this lagoon area from the land one has a continued building out of the landward end of the lagoon. At the same time, the water in the lagoon begins to shallow as muds, that is, silts and clays and some sand build up the floor of the lagoon and the mouth of the lagoon itself continues to move across the barrier beach, the barrier spit begins to accumulate materials across the mouth of the lagoon in the form, for instance, here of barrier islands.

Now, again, this is conjectural and it may well have been there was a more or less continuous spit or it may have been that here was some upward building of sand with wave action to form these low bars in this embayment.

The barrier spit on the southern end would also have extended northwards a short distance, but no great distance, because the predominant littoral drift, movement

[*281] of sand along *the coast, is from the north and probably 90 percent of all the sand along the coast comes from the north.

Within the lagoon, as mud flats begin to build up, some small islands would come into existence, very low muddy areas, and these would be colonized, again, by salt marsh or halophytic vegetation which consists of species native to this coast, salicornia, which is a pickle weed and spartina foliosa, which is a rice growth and these grow well beneath the tidal waters.

So we have a situation of a developing barrier lagoon system in which the barrier is beginning to form, distinctive characteristics.

The lagoon is beginning to fill in with sediment from the land and perhaps with some sand wash in from the sea.

This carries us to plaintiff's exhibit 22 which picks up the story a further 1500 years towards the present, at approximately 500 B.P. or around A.D. 1450.

By then, I imagine the lagoon, interms of sedimentation, was well advanced. The Los Angeles River or its actual feed portions would still be draining towards the lagoon. Centinela Creek, likewise, and the area of water had now substantially diminished.

The island within the lagoon, further mud flats come into existence, being colonized, are aiding in this reduction and the size of the lagoon.

At the same time, the barrier beach would have been very much longer in terms of its barrier characteristics, very much more effective as a barrier and only a com-
[*282] parative *narrow gap would now exist between the two opposing spits.

This would be sufficient to maintain an inlet, ingress of tidal waters and would be maintained almost certainly by the flushing action of waters draining from the land.

But even that flushing, of course, during periods of drought, would be ineffectual and, therefore, I envisage at about this time it may be quite likely that the barrier

closed entirely across but this does not invalidate this as a barrier lagoon system because this is a characteristic of barrier lagoon systems worldwide. They do build across the mouths, accumulate sand during periods of drought inland, periods of strong onshore wave action and then during the next storm, for example, October or November or December of a particular year, these barriers are breached by flood waters draining from the land.

And, at that time, this area would have been exceptionally low anyway and would be entirely flooded by waters draining from the land until they build up to the level where they begin to escarp or change through here.

[*283] *The change may have occurred at any point but the evidence suggests that where the predominant drift of sand is from the north that the outlet to Ballona Lagoon would have been toward the southern end.

To complete the picture, I summarize in a rather simple sense the United States Topographic Map for 1896 in plaintiff's exhibit 23 and this shows the logical extension of what had been happening a few hundred years previously.

By the 19th Century it would appear that sediments had been fed into the lagoon to the extent that the area of Abraum water was now substantially diminished. This is supported by the map evidence of previous exhibits, coast and geodetics survey in 1876, 1887, and the topographical map of 1896.

There were bodies of standing water still here and there but the majority of the lagoon had almost certainly been pushed by the sediments flowing from the land, or almost certainly being pushed against the coastal barrier.

During this period there was quite a lot of change from year to year, perhaps in the actual location of islands or small lagoons as a result of the very limited relief that these areas had. These were low salt marshes and could be escarped out by floods and the silt may be

deposited elsewhere, so, that in instances, there is no reason to worry why this is in existence here and not there because there was a lot of sediments going on and [illegible] waters.

[*284] [illegible], on this chart, plaintiff's exhibit 23, I have shown an area in brown which represents wind blown sand *that is accumulating on the barrier beach and also drifting across into the lagoon and, particularly, piling up on the salt flats — salt marshes — that occurred immediately to the east of the present area of Ballona Lagoon. This is well demonstrated in the field, in fact, on the east side of the present Ballona Lagoon. One can see wind blown sands actually lying somewhat impregnated with oil seepage, but lying on top of salt marsh deposits containing roots and so on, so, that is how this came into existence. The sand drifted across.

It was demonstrated on one of the aerial photographs that we saw and that is how one comes to explain the sand there and down here and also up here, lying more or less along the present coastline, but inland from the main barrier.

[*285] *In this cross section in the bottom right-hand corner of exhibit 23, I have drawn a very simplified cross section through the lagoon as I conceive it, showing the so-called 50-foot gravel of Poland and his colleagues, which represents the course of the Los Angeles River during late Pleistocene times, lying in turn on Pleistocene marine deposits of much greater age. They need not concern us, but they happen to form the floor of the channel in which the Los Angeles River was flowing, and then it was over the gravel that sea level rose and flooded inland to an elevation that was consistent with approximately present sea level.

The red stippled area represents the barrier beach. We are looking at a section from "A" to "B" on plan, and "A" to "B" in profile. The red stippled area represents the barrier beach with blown sand, the green stippled area representing the region of salt marsh sedimentation, that is, of silts, clays and perhaps coarser

materials, the sedimentation made by the processes of vegetal growth, particularly associated with spartine and salicornia species, and towards the lagoon itself topped with a small amount of sand wafted across from the open beach.

The prevailing winds are from the west in this area, west-northwest, and it is quite easy for the sand and the backshore to be winnowed when it is dry and carried inland to the lagoon and, indeed, within the lagoon itself much of the silt and clay is intermixed with sand according to Poland and his colleagues.

• • •

[*292] *MR. BITTING: I have conferred with counsel for the plaintiff, your Honor, and he has no objection to our marking this particular document which appears to be a certified copy of the plot of Ballona Rancho finally confirmed to Augustin Machado, et al, served under the orders of the Attorney General, by Henry Hancock, Deputy Surveyor, July, 1858.

THE COURT: And that was the Hancock survey to which you referred earlier?

MR. BITTING: That is what I had reference to.

THE COURT: It will be marked defendant's B for identification. So marked.

• • •

[*344] *Q Dr. Orme, did you familiarize yourself with defendants' exhibit B?

A Yes.

Q Can you show us defendants' B, which I believe is presently on the board.

A Defendants' B is a plat of the Ballona Rancho surveyed under the orders of the United States Surveyor General by Henry Hancock in July 1858.

Q What area is shown or denominated on this survey?

A An area referred to as the Ballona Rancho lying,
[*345] *primarily, in Township 2, south of range 15 west, and including a portion of an area referred to as the inner bay that lies behind the narrow strip of land along the so-called shore water bay of the Pacific Ocean.

Q Does the map show—

THE COURT: By "map", are you referring to defendants' B?

Q BY MR. PARRILLE: Does defendant's B show a channel inside the inner bay?

A It does.

Q Can you point that out to the court on defendants' B?

You are pointing in a northerly to southerly direction. What are the objects to both the west and east of that channel?

A The objects to the west, I would assume to be from my further field investigation, the barrier beach fronting the inner bay, lying between the inner bay and the open ocean; and the object to the east consists of a spit extending north from stake No. 23 and then a further island lying to the north of that.

• • •

[*346] *THE COURT: The pending question, Dr. Orme, is: Does the channel to which you made reference, a channel appearing on defendants' B, appear on a chart prepared by you which has been received into evidence in this case as plaintiff's 22?

• • •

[*347] *THE WITNESS: The plat, defendants' exhibit B, is an extremely poor plat that addresses primarily the matter of boundaries concerning the Ballona Rancho, and it shows the inner bay and such landfalls in and surrounding the inner bay in a purely stylized form drawn in undoubtedly, I would say, by eye, after the main survey of the boundaries of the Rancho had been completed.

My own stylized diagram, plaintiff's exhibit 22, is likewise stylized to make the point concerning the development of the lagoon through time. It is possible for me with my knowledge of the inadequacies of both these exhibits to, nevertheless, say that yes, I can locate approximately the area of this channel on defendants' exhibit B, also on plaintiff's exhibit 22.

I do this by reference, primarily, to the location of the barrier beach along the open coast.

• • •

[*357] *Q Dr. Orme, as to the channel which appears on defendant's B, the map of 1858, does that channel also appear on plaintiff's 13, the United States Coast and Geodetic Map of 1876?

A Yes.

Q As to that channel that appears on plaintiff's 13 in 1876, does it appear on plaintiff's 14, the map of 1887?

A Yes.

Q As to the channel which appears on plaintiff's 15, the map of 1896, does it appear there?

A Yes.

• • •

[*360] *Q BY MR. PARRILLE: Dr. Orme, do you have an opinion as to whether or not a channel existed in the same location in 1839 as in the year 1858?

A Yes.

Q What is that opinion?

A My opinion is that in view of the evidence for such channels throughout the latter half of the 19th Century, as demonstrated by these maps and plats exhibited here, that such a channel must, in all certainty, have been in existence in the years and decade prior to the first plat.

[*361] *The later maps and charts, defendants' exhibits 13, 14, and 15, all indicate areas of channel running parallel

with the shore. They all indicate areas of open water in Ballona Lagoon behind the barrier beach. They all indicate areas of marsh, and some of these things are brought out in this imperfect plat in the 1850's.

THE COURT: By the "imperfect plat," you are referring to —

THE WITNESS: Defendants' B.

It is my opinion, therefore, that this channel, in particular, that lies inland of the barrier beach must have existed for some considerable time prior to the date of defendant's B plat and that by some considerable time, I mean several decades if not a hundred years or more.

Q BY MR. PARRILLE: Do you have an opinion as to the size of the channel in 1839?

A I would imagine that, again, as an opinion, that the channel was probably somewhat larger in terms of a few yards of additional width in 1839 than it was later. It may have been somewhat deeper in terms of a few feet of additional depth.

These increments in depth and width are due to the addition of sediment having occurred after 1839.

Q Do you have an opinion as to whether or not the channel existing in 1839 differs in location from the channel in existence today?

A I have an opinion, yes.

Q What is your opinion?

[*362] *A My opinion is that the channel shown — suggested as existing in 1839 and shown in the 1850's, the 1870's, 1880's, is in fact still represented at the present time by the remnant of the channel that lies to the northwest of the entrance to Marina Del Rey, and is presently designated as Ballona Lagoon.

Q Do you have an opinion as to whether or not the channel existing in 1839 differs in size from the channel in existence today?

A The channel existing in 1839 would almost certainly have been larger in terms of width, depth, and length in 1839 than it is today, as a result of the fact that in 1839 less sedimentation had taken place within the channel.

Sedimentation is a cumulative process, for the most part, through time. One can anticipate that over time such channels are slowly infilled with sediment, although this cumulative effect is a net effect, there being a flushing action associated with the tidal and stream scour that tends to remove a portion of all sediment accumulated within such situations.

Q Thank you, you may resume the stand, Dr. Orme.

As an expert and scholar in the field of coastal ecology, have you formed an opinion as to whether the Ballona Lagoon contributes the ecology of the coastal area of Southern California?

• • •

[*366] *THE COURT: The pending question, Dr. Orme, which you may answer, reads as follows: "As an expert and scholar in the field of coastal ecology have you formed an opinion as to whether the Ballona Lagoon contributes to the ecology of the coastal area of Southern California?"

THE WITNESS: Yes.

• • •

Q What is your opinion, Dr. Orme?

A Ballona Lagoon, as it presently exists, is the remnant of a much larger coastal ecosystem, focusing on a salt marsh and a coastal barrier beach. As such, even in its remnant form, it has significant scientific and educational value, both to formal educational institutions and to the public at large.

Specifically, as a body of water, subject to tidal influences, as the remnant of a larger ecosystem that includes a salt marsh flora or the remnants thereof, it

forms a very valuable resource from the educational point of view, for the education of students and the public.

There are sources of the lagoon which include the inorganic or mineral characteristics of the habitat, specifically, the sand, silt and clay form the banks and bed of the lagoon and also the organic resources of the habi-
[*367] tat, specifically, *various species of salt marsh vegetation such as those that I indicated yesterday, to include, but not only be confined to salicornia species, and salt grasses. They are typical of a salt marsh environment.

And it also includes the animal portions of the environment, including a molluscan fauna, including clams and other lagunal animals.

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[*369] *CROSS-EXAMINATION

BY MR. BITTING:

• • •

[*395] *Q Now, I believe yesterday, Dr. Orme, you described a phenomena known as littoral drift.

A Correct.

Q As I understand it, littoral drift is an action of the wind and tide as it affects the coastline depicted on plaintiff's exhibit 13 in a southeasterly direction along the coastline.

A No, but I would be prepared to expand and correct your interpretation.

Q All right.

A Littoral drift is a movement of sand and other materials in suspension and in bottom transport along the shore or along the nearshore bottom. This is a product of a prevailing current that is moving, in this particular instance, from north to south. This current, in turn, being induced by wave action which is, in turn, induced by the prevailing wind.

Q I believe you stated that this action occurs in a southwesterly direction only approximately ten percent
[*396] *of the time.

A Yes.

Q In other words, if one goes down to the sea coast in Santa Monica Bay, one will find that the sand on a groin perpendicular to the coastline is more prominent on the north side of the groin than on the south side of the groin?

A Correct.

Q As I understand your testimony, this is the reason why the area that you have described as the barrier beach over the years was formed, basically, groin from north to south rather than from south to north.

A Correct.

Q And this phenomenon known as littoral drift would occasionally cause a closing of any opening wherein the water in Ballona Lagoon flowed into the ocean?

A A temporary closing, yes.

Q When you say a temporary closing, Dr. Orme, do you mean a matter of six months, perhaps?

A I would mean primarily a matter of days, perhaps weeks — but certainly, for the most part, not more than a few months.

Q What event might occur that would create an opening?

A Two events might occur. First of all, a major storm surge occurring in response to a westerly or southwesterly or southerly storm might push wave action against the barrier beach and cause knit scour on the
[*397] beach face. *This would come down the beach, claw it away, pull it back seawards and, in that way, begin to weaken the barrier holding back the waters behind the barrier.

Such a storm surge might cross the barrier and actually breach by just wave erosion, actually breach the barrier

beach. More commonly, however, such a breach is maintained by the discharge of water from the land. The water would be draining throughout the Ballona Creek watershed and the Centinela Creek watershed and the various ramifications of the drainage network that drains into the Ballona Lagoon, and these would periodically build up until they sought an outlet towards the sea, which would be their natural base level.

In other words, the level to which water draining from the land would attempt to reach and, in that way, they would seek to breach the barrier beach at the lowest point, at the weakest point, at the narrowest point, and these points would commonly be where the barrier beach was last closed. So, there is a flushing action associated with flood waters from the land that will tend to maintain outlets through barrier beaches for long periods and, in Southern California, this would be particularly during the winter rainy season from October through March, at least, and probably continuing into the summer months one could envisage under natural conditions the maintenance of an open inlet from the lagoon to the ocean.

[*398] *Q So then, if I understand your testimony, in a particular year if the opening had closed, as you have described, and we experienced a particularly dry year the barrier beach might not be opened for a period nearly a year?

A That is theoretically possible.

Q In your work in connection with your preparation for testimony here did you make an investigation of weather conditions in the 19th Century as it may have affected this area we know as Rancho Ballona?

A I did not make an investigation of such weather conditions because the records are inadequate, but I presupposed that weather conditions in the 19th Century were not dissimilar, significantly, from those of the present time.

Q You may take the witness stand.

Now, directing your attention to defendant's exhibit B, the plat of Ballona Rancho, I note that at least in the area platted on here there is no apparent opening to the ocean; is that correct?

A That would appear correct.

Q So at this particular point in time when Henry Hancock did his work, at least, with respect to matters depicted on exhibit B there was no opening to the ocean?

A If you are asking me for an opinion on that, I will state that this map is totally inadequate to really state with any definition that there was no such opening. One has to bear in mind the cartographer's artistry in designing a map such as this. This is obviously a highly stylized
[*399] representation of the inner bay and as they were *mainly concerned with defining the boundaries of the Rancho, it appears that they probably may have, quite conceivably, waded through water here along the barrier.

I don't think the absence of an outlet means there was no outlet or, if it does, it may just have been on the day that they surveyed there was no outlet. It does not mean that the next day the outlet was not in existence.

Q But, as I understand your testimony, Dr. Orme, it is possible that the outlet could have been blocked at that time for several months, at least

A It is possible but improbable.

* * *

[*403] *Q Coming back to plaintiff's exhibit 13, I find that what you have described as the opening through the barrier beach at what appears to be the extreme south end of what you have described as the barrier beach, is somewhat farther south than the opening on plaintiff's exhibit 14 where the "New Piers" are indicated.

A Yes.

Q And, I take it, the reason for this apparent change is at least based upon one factor, being that the opening

on the south end on plaintiff's exhibit 13 closed between 1876 and 1886.

MR. PARRILLE: Objection.

THE WITNESS: Not necessarily.

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[*404] *THE WITNESS: The position of waterways through barrier beaches is highly variable. Water may continue to flow through a barrier beach, over a barrier beach in maintaining a channel through such a beach, while eroding on one side of the channel and depositing on the other side. In such a way, the channel may, in fact, migrate several feet, several score yards on occasion, in one direction or the other, up or down the coast, without ever actually closing.

The fact that one has here on one map dated in 1876 the position of the entrance at the extreme south end of the barrier lagoon complex, and then 11 years later one has the apparently engineered entrance to barrier or exit from the barrier lagoon system somewhat farther north causes me no great concern. I rather imagine that the engineers in 1887 were simply trying to stabilize a channel that had migrated to that position during those 11 years, and it would be possible at any time, both before and after 1886, for the flood water from the land to punch a major channel through the barrier beach at any position.

• • •

[*405] *Q Dr. Orme, in your opinion, what was the first significant interference by man with the barrier lagoon system you have described?

A By "significant", I am uncertain as to the meaning of this word.

If you mean statistical significance, then, I have no basis for measurement upon which to establish such statistical significance but, if you mean in terms of my
[*406] opinion, *in terms of my observations and opinions concerning this area, I imagine that the pre-Columbian

episode of occupation of this area would have had no significant impact and that significant impact may well have occurred perhaps during the period of Spanish land settlement in the 18th and early 19th Centuries and may have been associated, for example, with cattle stomping in the salt marsh and pummeling the barrier beach and generally watering themselves in the briny.

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Trial Testimony of Carrol A. Richards

[*723] *CARROL A. RICHARDS,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Carrol, C-a-r-r-o-l A. Richards, R-i-c-h-a-r-d-s.

[*724] *DIRECT EXAMINATION

BY MR. PARRILLE:

Q Can you tell the court what your occupation is.

A I am a geologist.

Q By whom are you employed, sir?

A The City of Los Angeles.

Q Any special department of the City of Los Angeles?

A The Bureau of Engineering with the Department of Public Works.

Q Can you describe your educational background for us.

A Yes. I received a bachelor of science degree in geology from the University of Miami, Coral Gables, Florida.

I received a master of science degree in geology from the University of Southern California in Los Angeles. That was in August of 1957.

Q Can you describe your work experience after completing your master of science degree at the University of Southern California.

A Yes.

I have worked for Western Gulf Oil Company for about a year or less than a year, on offshore exploration and where I correlated the offshore formations with

onshore formations and for two years I was with the California Division of State Lands, where I worked with
[*725] state-owned lands, *mineral deposits thereon, which included mineral deposits, especially oil, on tidelands.

In 1959 I entered employment with the City of Los Angeles, working for three years in petroleum administration then went to the Department of Public Works where I have specialized in engineering geology for the last 15 — going on 16 — years.

Q Can you tell us your most recent work experiences as a geologist.

A Yes.

I have worked on landslides as far as detecting them, investigating the causes and remedial work that it would take to repair them and stabilize the slopes, investigate hillside developments where tentative tracts are requested by developers on hillside lands.

In this work I review consulting geologists' reports and check them for any omissions or anything that I would like to add to their recommendations for stabilizing slopes on these tracts.

I work with other agencies in the city and city officials on all land that is owned by the city, in trust by the city, for recretation and park sites, for streets, roadways, sewer lines, drainage devices of all kinds or geologist related, as far as flood control channels and outlets and pipes, rights-of-way and, of course, street rights-of-way, as far as proposed rights-of-way. Sometimes we recommend that they change the proposed alignment because of geologic hazards.

[*726] *And I do a little bit of work on the side, as far as consulting. Friends occasionally ask me to investigate a site. I did a site down in South Laguna on a beach area where sea erosion had developed a cave and had caused erosion of the sea cliffs in front of the house and this cave has caused a dangerous condition because the house is somewhat undermined because of this sea cave.

[*727] *Another area around Arcadia where ancient sand dunes or barrier combination of sand dunes and barrier island has drifted over unturned Pliocene sediment. Well-indurated Pliocene sediment, and the stability of this area was in question, and I made an examination and report on that.

Q Can you tell the court if you have ever instructed any students in courses in geology?

A Yes, since 1972, I have taught classes of engineering geology at Valley College in the evening, and I am presently teaching at Valley College a class in physical geology, and I teach a lab course at Trade Tech on Thursdays, my day off. In the evenings on Thursday, I teach a Burbank adult school class in rocks and minerals of California. And on Monday, I teach a class on the geology of California.

Recently, I conducted a seminar down at Cal-State Long Beach in conjunction with a state geologist, Dr. Slauson, in the "Environmental Aspects of Public Works Projects."

Last year, I conducted the same type of seminar with a consultant by the name of Mr. Lee Bauvier.

Q Have you been appointed to any boards since you have become a geologist?

A Yes, sir, I have been appointed to the Board of Planning Commissioners of the City of Burbank, where I served for three years.

I also have served as a vice president — which is not
[*728] connected with geology — but vice president of *Santa's Workshop, Inc., a nonprofit organization, charitable organization.

I also served on the Board of the Hindustani Bible Institute, a missionary organization.

Q Have you published any papers in the field of geology?

A Yes, I published "Radioactivity Associated with Petroleum" back in —

THE COURT: Would you keep your voice up a bit, sir.

THE WITNESS: Yes. I published a paper entitled "Radioactivity Associated with Petroleum" for the S.C. Engineer, one of my first efforts back in 1953; and "Radioactive Deposits in the Twenty-Nine Palms Area" which was published in a local mining journal, California Mining Journal, and the Denver Mining Record.

Then, more recently, I have published a paper "How the Geologist Can Help Your City". This was published by the American City Magazine, 1970.

Still more recently, I had a paper published in a special publication by the Engineering Geologists Association Convention Bulletin, called "The Environmental Aspects of Petroleum in the Urban Environment."

Q BY MR. PARRILLE: Are you a member of any related associations in the field of geology?

A The American Association of Petroleum Geologists, and the Association of Engineering Geologists and a member of the Colorado Mining Association.

[*729] Q Are you a registered geologist with the State *of California?

A I am.

Q Can you tell us your number, please.

A One hundred.

Q Are you a registered engineering geologist in the State of California?

A I am.

Q Can you tell us your number.

A Fifty.

Q Can you explain what an engineering geologist is, sir?

A Investigations of sites for geologic hazards, for geologic conditions, for the use by an engineer in prepar-

ing plans for building or design of some civil engineering project. This is mainly it.

Q Were you requested by the City Attorney of the City of Los Angeles to undertake a geological investigation of Ballona Lagoon to determine its origin?

A I was.

• • •

[*732] *Q Now, when did you first begin your investigation into the geological origins of Ballona Lagoon?

A 1966.

Q What was your first step in initiating your investigation?

A Well, I used many of the same techniques that we utilize for any geologic or engineering geologic investigation. I researched the information that was available, if there were any geologic reports, literature that pertained to lagoon systems, barrier beaches, barrier islands.

I examined U.S. topographic maps. I purchased four of various dates going back to the survey of 1894 which were available from the U.S. Geological Survey.

[*733] *I examined old photographs in the city attorney's office as well as old topographic surveys and compared those topographic maps with those maps in my possession.

Then I determined the trenching on either side of the waterway as shown on the maps that I had as Ballona Lagoon. This trenching would enable me to examine the subsurface.

The next step was contracting for a large backhoe to do the trenching. Then I made, during the trenching, quick sketches of every trench — very rough — took photographs, examined features, examined sampling, took representative samples to the laboratory for more detailed analysis and then I compared the results of these analyses with the results obtained from older unpublished reports on El Segundo dune sands and Hermosa Beach sands.

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[*737] *Q Can you tell the court the nature of the trenches that were dug and how deep they were, how wide, how long.

A They varied in depth from five or six feet to perhaps nine feet deep. In width, from five and a half, six feet to perhaps 12 feet wide. They were usually longer along the street right-of-way than they were in width, limited again by the public right-of-way of the street. They were limited in some cases by the influx of water from the adjacent lagoon. Water did seep in from the lagoon into the bottom of the hole. Caving was another problem that caused widening of the hole at times.

Q Can you tell the court what the purpose of the trenching was.

A That was to examine the nature of the materials to see if there were observable amounts of fill on either side of the lagoon, or if these were natural sediments. That was the main purpose of the holes.

Q Did you extract samples of materials from the trenches?

A I did.

Q Did you analyze and study the samples that you obtained from the trenches?

A I did.

Q Did you, during the course of your investigation, have any radiocarbon data made of the material?

A I did.

Q Please continue, sir.

[*738] *A From hole number 10, there was an organic, rich substratum about four and a half, five feet down, that I took to UCLA, Dr. Ranier Berger, for analysis and age dating.

Q Did you receive the results of that radiocarbon dating, sir?

A I did.

Q What were the results of the tests done by Dr. Berger?

A Nine hundred ten years before the present, plus or minus 200 years.

Q Now, what did that date indicate to you, as to the origins of Ballona Lagoon?

A That indicated to me that that particular stratum was laid down 910 years ago, again plus or minus the discrepancy.

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[*739] *Q BY MR. PARRILLE: Mr. Richards, was the radiocarbon dating sample and the results of it of assistance to you in formulating your opinion as to the origins of Ballona Lagoon?

A Yes.

Q Did you undertake any other investigation to determine the origins of Ballona Lagoon?

A Yes, I have examined old maps and studied the literature pertaining to lagoons and lagunal systems and have compared that with the geomorphology, physiography as evidenced at the site, and coupled with the examination of the trenches themselves, the natural features that I saw, all of this was researched in the literature to see if I could come to a valid conclusion.

Q How many times have you seen Ballona Lagoon, Mr. Richards?

A Many times. The last time — many times.

Q May I ask when the last time was that you saw Ballona Lagoon?

A February 18, as I recall.

Q That would be 1975?

A 1975.

Q Have you consulted with other geologists, engineers, or persons familiar with geology in formulating
[*740] *your opinion?

A Yes.

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[*741] *Q Now, based upon your investigation, skill, experience, training and knowledge, have you formulated an opinion as to the origins of Ballona Lagoon?

A I have.

Q Now, sir, with the assistance of the charts that you have prepared, which are marked plaintiff's 69 through 75, can you tell us exactly what your opinion is as to the origin of Ballona Lagoon?

A Yes, starting with exhibit 69, commonly an offshore bar is created by wave action offshore and begins to migrate toward the beach on a gently sloping beach, such as the one offshore of Ballona wash, Ballona outwash plane.

Q Are you now referring to plaintiff's 69?

A I am.

Q Thank you.

Can you orient us as to what the chart depicts, please.

A This feature on the right side is the offshore bar forming beneath the surface of the ocean. It has been formed by wave action typically migrating toward the beach.

[*742] *Q Continue on, please.

A Now, I'd have to have exhibits B and C.

Exhibit B shows the barrier island as it has migrated farther toward shore and onto the marsh and some marshy deposits are showing up now on the shoreward side, marsh grass will be growing in the marsh.

Lagunal water would be forming under the bar because there would be a slight entrapment, although it would be connected to the ocean by openings in the

barrier island. Still, you have a rather quiet area here, protected from wave action.

So, marsh grass begins to grow. The finer grain sediments are deposited in this area of quiet water.

Next, exhibit No. 71 depicts the barrier island having migrated farther toward the marsh, a tidal creek is shown as an area still draining the marsh and coming from streams from the interior going out toward the ocean which drain through openings in the barrier island into the ocean.

At this time, I postulate a longshore bar being developed as a spit from the area toward the north. This is being created by longshore currents.

THE COURT: It's almost like stop-frame photography. What time interval from "A" to "B" and from "B" to "C"?

THE WITNESS: It could be as much as 40 years, maybe a hundred. There could be as little as 25 years. These longshore bars develop sometimes within a period of 25 years. So, for an unknown time.

[*743] *This, your Honor, is the age dating to get an idea of what time we are talking about that this formed.

THE COURT: No, did you form an opinion as to the length of the longshore bar? Do you have a profile?

Excuse me. I have a telephone call. We will take a recess until 10 minutes to 3, afternoon recess.

(Recess.)

[*744] *THE COURT: Would the reporter please read the last question and answer?

(Record read.)

THE WITNESS: Yes, your Honor. It is about three miles long, using the exhibit number 15.

THE COURT: Is that 15 appearing on the yellow slip in the lower left-hand corner?

THE WITNESS: Yes, on exhibit 15, the U.S. topographic map surveyed in 1894 shows the bar, at that time, to be approximately three miles long.

Now, as far as the time interval goes from the original tidal lagoon or marsh land to the time that this appears that we have here where there is a barrier island, which has migrated over the marsh quite a distance and the development of a longshore bar, could well be thousands of years. We have no way of knowing and this is why I asked for the age dating of some of the organic material in the sediments.

Now, exhibit D, which is exhibit No. 72 on the plaintiff's list of exhibits, shows Ballona Lagoon as it finally developed, with the lagoon between the first barrier island which has migrated over the marsh and the second barrier island which has developed as a longshore spit.

Now, if I might have the final exhibit No. 73 showing a cross section from the northeast to the southwest.

This is a diagrammatic sketch of the present day Ballona Lagoon, with the exception of the modern day improvements by man toward the northeast, which is constituted by the Marina Del Rey harbor.

[*745] *From my investigation of the trenches, I could see that there were natural deposits in the case of the northeast side, there was an old back beach soil deposit anywhere from six inches to a foot in thickness on the top.

Then, below that, was a medium grained grey sand with typical laminations of dark minerals, layers of dark minerals cross-bedded in places, parallel to the lagoon in places, dipping sometimes on either side parallel to the lagoon, but many times the slope of the laminations was toward the lagoon.

On this side — well, to continue, you have the zone 2, which is an old beach deposit as I postulated from examination of the laminations of dark minerals. The grain size, the size — the lack of frosting and pitting on the grains, which is typical of a blown sand, for instance, although there was some.

As we trenched downward, there were beginnings of a grayer, dark gray to greenish sand which had old plant remains in it, organic material. The farther down we got, the more organic it got to where I call zone 4, which appeared to be old lagunal muds, so this is why I postulated that this barrier island migrated over the old lagoon and marsh land and the fact that I found plant remains in this zone 3, below the zone 2 of the old beach deposit, led me to believe, also, that it migrated toward the northeast.

Now, as we go on the seaward side, you also have dark layers. You have very little soil zone. Maybe two inches,
[*746] sometimes as much as four inches. A little bit of *organic material, but very poorly developed. Sometimes there were amounts of man-made fill. This goes for both sides, but it is easily detected because it had construction debris in it. Below that you had, again, medium to fine grain sand with the winnowed dark laminations of the heavier minerals, and dark minerals usually indicate heavier minerals, so it was started out by wind action as the wind drifted over this longshore barrier island, carried toward the lagoon.

Of course, heavy winds would carry it completely across to the other side, so from examination of these dark laminations, from the grain size, and if we find that there are more frosting and pitting in evidence on this side of the lagoon, then that's typical of a windblown deposit without the cushioning effect of water.

So that examination, then, in the laboratory showed a sample here from this side to be very similar to a sample that I investigated back in 1952 of a blown sand at El Segundo. Very similar to the grain size, mineralogical content, the sorting, the frosting and pitting.

On this side examination of the old beach deposit in zone 2, what I call the old beach deposit of zone 2, was very similar to the sample of Hermosa Beach sand that I had examined back in 1952. Composition, the magnatite and kinetic composition of the heavy minerals were very similar to both cases. So, from that, I deduced that this side of the lagoon was of natural origin regardless of

when this first began to be formed. Thousands of years
[*747] ago or *maybe just a thousand, eleven hundred years ago. The age dating was very important, taken from this side of the lagoon, because it tells me that this old beach deposit came in over the old marsh and this one spot where I took the sample at hole 10, 910 years ago plus or minus 200.

So, it might have been 1110 years ago or 710 years ago. But I rather suspect that it is on the upper side.

[*748] *So, for that reason, I deduced that the lands on both sides of the lagoon and the lagoon itself are of natural origin and I heard Dr. Orme's testimony the other day. Again, I have no quarrel with him. I agree. It is of natural origin.

Q BY MR. PARRILLE: Mr. Richards, what facet of the investigation do you feel is most significant in reaching your opinion?

A The physical examination of the trenches.

Q Were the exhibits marked 69 through 74 prepared from charts that you yourself had sketched and drawn?

A Yes.

Q And were they blown up for courtroom purposes?

A Yes, they were.

Q Did you utilize these charts in assisting you in formulating your opinion?

A Yes, I did.

Q And do they represent the results of the trenching and your study of maps and photographs and other documents?

A Yes.

MR. PARRILLE: We offer into evidence plaintiff's 69 through 75 at this time, your Honor.

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[*750] *Q Mr. Richards, referring to plaintiff's 75 and the area colored in red upon which you did your study and made your investigation, have you formulated an opinion as to whether that area is in the same location as it was 1,000 years ago?

A I have.

Q What is your opinion?

A In my opinion, this portion of Ballona Lagoon is very much as it has existed for approximately 1,000 years.

THE COURT: By "this portion" are you referring to the portion that has been colored in red?

THE WITNESS: The portion colored in red, your Honor.

THE COURT: Well, that is the entire Ballona Lagoon; is that right?

THE WITNESS: It is the remnant, your Honor. The formerly existing Ballona Lagoon covered a much more extensive area. This is all that I confined my examination to because, in my opinion, this could definitely be shown and I proved to myself that this was a remnant of the original lagoon.

THE COURT: The question that was put to you, as I
[*751] *understood it, sir, was whether the portion on plaintiff's 75 which you have outlined in red had the same latitude, the same longitude at all of its points 1,000 years ago as it has today.

THE WITNESS: Yes, sir. This area in red has existed within those same boundaries, more or less —

THE COURT: For 1,000?

THE WITNESS: Yes.

THE COURT: 1500?

THE WITNESS: I would say 1100 years because of the age date.

THE COURT: 1102?

THE WITNESS: Yes. I have found that there is a little bit of spillage and my trenches showed a little bit of spillage came from one side where the winds had blown over this barrier island on the seaward side and had blown over and gone into the lagoon, covered up maybe two, two and a half feet or so into the lagoon.

THE COURT: Thank you.

Anything else, Mr. Parrille?

MR. PARRILLE: I have no further questions, your Honor.

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Trial Testimony of Earl Weisbaum

[*805] *EARL WEISBAUM,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

THE CLERK: Be seated and state your name, please.

THE WITNESS: Earl Weisbaum, W-e-i-s-b-a-u-m.

DIRECT EXAMINATION

BY MR. PARRILLE:

Q Mr. Weisbaum, can you state your occupation, please.

A I am Foreign Law Librarian at the County Law Library here in Los Angeles. I am also an attorney at law.

Q How long have you been the county foreign law
[*806] *Librarian?

A Since 1971 or 1972, I am not sure.

I was acting foreign law librarian beginning in 1971, and at some date when my predecessor fell ill and upon his subsequent death, I was made foreign law librarian.

THE COURT: Are you admitted to practice in the State of California?

THE WITNESS: Yes, sir.

THE COURT: When were you so admitted?

THE WITNESS: January of 1971.

THE COURT: Are you admitted to practice in any other jurisdiction?

THE WITNESS: No, just the state and federal courts in California.

THE COURT: Thank you.

You may proceed, Mr. Parrille.

MR. PARRILLE: Thank you, your Honor.

Q Can you describe your educational background, Mr. Weisbaum.

A My legal education, you are referring to?

Q Yes, sir.

A I am a graduate of Loyola Law School in Los Angeles, graduating in June of 1970.

Q Can you describe your educational background prior to law school.

A Well, I graduated from Cal State College here in Los Angeles, and also from the University of Southern California School of Library Science in 1971.

[*807] *Q Are you a member —

A I am sorry, 1961.

Q Are you a member of any honorary societies or associations?

A I am a member of the American Association of Law Libraries, International Association of Law Libraries, Foreign Law Association, and Beta Phi Mu, which is an honor society for librarians.

Q Have you been employed by any other library or any other law library in the State of California?

A No, I have worked only at the L.A. County Law Library.

Q Do you speak any foreign languages?

A I can read Spanish and French, plus I have some knowledge of other foreign languages sufficient to handle and select books for the foreign collection.

Q Have you written any articles on international law?

A I wrote an article on the Hague convention for Service of Process Abroad, which was published in the L. A. Bar Bulletin, I think, in 1972 or 1973, I can't recall now. Plus an article on Territorial Waters that appeared in the "Lawyer of the Americas".

[*808] *Q Have you instructed any courses in law?

A Yes, I am on the faculty at Mid-Valley College of Law, where I teach Conflict of Laws, and Legal Bibliography.

Q Have you lectured or given any seminars on foreign law?

A I have not lectured, but I am chairing a symposium on Mexican Law that will be held here in Los Angeles in June of this year at the Convention of the American Association of Law Libraries.

Q Where will the symposium be held?

A At the Century Plaza Hotel.

Q Have you been employed to advise or consult with any person on foreign law?

A Yes, I have prepared memoranda for attorneys in the Southern California area, and I have appeared as a witness in the superior courts of Los Angeles, Orange, and San Bernardino Counties in matters involving foreign law.

Q Have you been employed to advise or consult anyone on Mexican law?

A Certainly. I have testified in those superior courts on Mexican law.

I have prepared a memorandum for the Division of Highways in the State of California about two years ago, concerning Mexican water law.

Q Is it safe to say you have researched and studied textbooks and other material regarding the history of Mexican law and Spanish law?

[*809] *A Yes, I have done such research.

Q Have you had such research and study into the history of Mexican water law?

A Yes.

Q Has your study into the textbooks and articles concerned Mexican water law in force during the period of time when Mexico was a sovereign state?

A Yes, but Mexico is still a sovereign state. You mean when Mexico was a sovereign in this part of the United States?

Q Yes, sir.

A Then the answer is yes.

Q Have you studied Mexican water rights laws in force during the 19th Century?

A Yes.

Q Can you give us a sampling of the books of reference you have studied or reveiwed as to Mexican water laws?

A Well, there are a number of well-known titles that go back to old Spanish law. Las Siete Partidas is one. That was called the Recopilacion —

THE COURT: Would you give us the spelling of each of the books that you will be reciting, books that have Spanish titles.

THE WITNESS: Yes. Las Siete Partidas, L-a-s, S-i-e-t-e, P-a-r-t-i-d-a-s.

The second title I mentioned is Recopilacion, R-e-c-o-p-i-l-a-c-i-o-n, d-e, l-a-s, L-e-y-e-s d-e l-o-s R-e-y-n-o-s d-e l-a-s I-n-d-i-a-s.

[*810] *THE COURT: Thank you.

Have you concluded your answer, sir?

THE WITNESS: I am sorry.

There are works by authors in the English language.

Hamilton is one author.

Rockwell is another.

White, another.

Professor Scott has translated Las Siete Partidas and I have consulted his translation and in Spanish there is a writer named Escriche.

Another one named Galvan.

And that's all that comes to mind at the moment.

Q BY MR. PARRILLE: And do you keep current in changes in Mexican law, Mexican codes?

A Well, Mexico is a Federal Republic like the United States and there are now 33 states so I don't keep up with all of it. I try to keep up with Federal Mexican Law and some of the law of other states like Baja California.

Q Mr. Weisbaum, in 1848 was there any codification of laws utilized by the Mexican Government in California?

A Well, the main collection of laws was the Recopilacion that I spelled out before and that was the law applied in the Spanish colonies and continued in Mexico.

Q And that law governed the rights of private persons and the public in California?

A Yes.

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[*816] *Q BY MR. PARRILLE: Prior to or on or about 1848, do you have an opinion as to what the Mexican law as to water rights or the rights of the public to use navigable waters in California?

A Yes.

Q What is your opinion?

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[*818] *THE WITNESS: It is my opinion that prior to 1848 in what is now the State of California that was, at that time, part of the Republic of Mexico, that navigable waters were subject to public use.

Q BY MR. PARRILLE: Now, when you say the navigable waters were subject to public use can you expand on the meaning of that?

THE COURT: Excuse me. I don't believe that you have recited the witness' testimony correctly, Mr. Parrille. I believe the witness testified that prior to 1848 in what is now the State of California, navigable waters were subject to public use.

MR. PARRILLE: I believe that's what he stated.

THE COURT: You said "a public use."

MR. PARRILLE: I apologize. I meant to say "to public use."

Q Can you amplify upon your statement as to the meaning of the navigable waters being subject to public use?

A Navigable waters were property or belonged to the sovereign under Mexican law and Spanish law that preceded it and, as was stated in many of the riders concerning water law, the navigable waters are common, that is, available to the public to use.

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[*824] *Q BY MR. PARRILLE: Mr. Weisbaum, are you familiar with Part III, Title XXVIII, Law 6 of Las Siete Partidas?

A Yes.

Q In substance, can you tell us what the law says?

MR. BITTING: I will object to that, your Honor. The law is the best evidence of what it is.

THE COURT: The objection is sustained.

Q BY MR. PARRILLE: I show you plaintiff's 5 for identification, Mr. Weisbaum, referring specifically to that portion dealing with Law 6 of Las Siete Partidas, Part III, Title XXVIII, and ask you if you recognize the translation which appears therein?

A Yes, I do recognize it.

Q Can you read it, sir?

A Law 6:

"Every man has a right to make use of harbors, rivers and highways. Rivers, harbors and public highways belong to all persons in common so that parties from
[*825] foreign countries *can make use of them just as those who

live or dwell in the country where they are situated and although the banks of rivers are, so far as their ownership is concerned, the property of those whose lands include them, nevertheless, every man has a right to use them by mooring vessels to the trees, by repairing his ships and his sails upon them and by landing his merchandise there and fishermen have the right to deposit their fish and sell them and dry their nets there and to use said banks for every other purpose like these which appertain to the calling and the trade by which they live."

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[*833] *THE COURT:

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[*834] *Now, the pending question, Mr. Weisbaum, is this: — If you understand it, please answer. If you don't understand the question, indicate that you don't understand it — was Law 6 of Part III of Title XXVIII of Las Siete Partidas a part of the general laws in effect in California in 1848?

THE WITNESS: It is my opinion that it was in effect here in 1848 or prior to 1848.

THE COURT: Your answer is: "In my opinion Las Siete Partidas were a part of the general laws in effect in California in 1848"; is that your answer, sir?

THE WITNESS: Yes, that is my answer.

Can I comment further?

THE COURT: Yes, sir.

THE WITNESS: Las Siete Partidas was said to be of the highest authority by American writers on Mexican and Spanish law as recently as 1851. Schmidt so stated in his work and other writers and it's been like, I understand, litigated in California and elsewhere that it was part of the law in Mexico and therefore, in California, when California was part of Mexico.

THE COURT: When did it become the law in Mexico, whose geographical boundaries we are familiar with today?

THE WITNESS: It was made applicable to the Spanish colonies by the Recopilacion de las Leyes de los reynos de las Indias, and that was as early as the 16th Century, and re-ratified, I think, as late as 1805.

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[*838] *BY MR. PARRILLE:

Q Yesterday you testified that under Mexican law in force prior to 1848 the navigable waters were available for public use; is that correct?

A Yes.

MR. BITTING: I object to that. His testimony is contained in the record.

THE COURT: Will the reporter please read the question that was just answered?

(Question read.)

THE COURT: The objection is overruled.

[*839] Q BY MR. PARRILE: In your opinion, Mr. Weisbaum, *under the laws of Mexico in force prior to 1848 in California would the public have the right to use navigable waters located on private property for navigational purposes?

A Yes.

MR. PARRILLE: I have no further questions.

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Trial Testimony of Federico Laffan

[*1008] *FEDERICO LAFFAN,

called as a witness on behalf of Defendant Summa Corporation, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your full name and spell your last name for the record.

THE WITNESS: My name is Federico, F-e-d-e-r-i-c-o Laffan, L-a-f-f-a-n.

DIRECT EXAMINATION

BY MR. BITTING:

Q What is your occupation, Mr. Laffan?

A I am an attorney at law.

Q And where is your residence?

A In the City of Mexico in the Republic of Mexico.

Q Do you maintain offices in Mexico City?

A I do maintain law offices in Mexico City, yes.

Q How long have you maintained those law offices in
[*1009] *Mexico City?

A In junior association with others and in senior association, 16, 17 years.

Q And is there a firm of which you are presently a member?

A Yes.

Q Would you tell us the name of that firm.

A The name is Deregil, Laffan y Igartua.

Q Are you a partner in that law firm?

A I am.

Q Now, Mr. Laffan, did you attend a law school?

A Where?

Q No; I said did you attend a law school.

A I did attend a law school.

Q Which law school did you attend?

A I attended two law schools. I attended the University of Texas Law School in Austin, Texas and I attended the National University of Mexico Law School in the City of Mexico.

*1010] *Q Did you obtain a degree from the University of Texas Law School?

A I did. I have an LLB from the University of Texas Law School.

Q When did you obtain that?

A 1958.

Q Did you obtain a degree from the National University of Mexico?

A Yes, I obtained the equivalent of an LLB from the National University of Mexico Law School in 19— between 1963 and 1965. I can't recall at the moment. I think the formal act of obtaining the degree was 1965, involved a professional exam.

Q Did you practice law while you were attending the National University of Mexico?

A Yes, I practiced law while attending law school.

Q What was the name of the firm you worked with while you were attending law school at the National University of Mexico?

A I worked with a firm called Goodrich, Dalton, Little & Riquelme, in Mexico City.

Q Now, Mr. Laffan, have you had occasion to lecture at any universities?

A Yes, I have had occasion to lecture at law schools in the United States. Law school of the University of California at Los Angeles. The law school of the University of Houston in Houston. The law school of the University of St. Mary's in San Antonio, Texas.

[*1011] *Q What were the subject matters of those lectures at the law school?

A Basically, comparative law in matters concerning commercial — concerning commercial matters.

Q Now, were these one-time lectures, or were they classroom situations that extended for a period of time?

A In each case they were lecture programs of several days, ranging from ten days to a month for credit for the students attending.

Q Now, in the past 14 to 15 years, have you specialized in any particular area of law as it pertains to the Republic of Mexico?

A I have done a substantial amount of my work in the fields of real estate development, real estate and necessarily the attendant real estate laws. The financing of real estate development and general corporate work.

Q Are you duly licensed by the Government of Mexico to practice law in Mexico City?

A I am.

Q Are you licensed to practice law in the United States in any one of its states?

A I am not.

Q Could you identify some of the types of transactions in which you have been engaged as a lawyer over, say, the last ten years, to perform work in the Republic of Mexico?

[*1012] A In the acquisition of real estate, title search, *title litigations, the administrative law attendant to the development of real estate, especially in the lines of multiple housing and in the lines of resort hotels, condominiums, villas, on the coast and inland.

[*1013] *Q Have you performed legal work for U.S. based companies doing business in the Republic of Mexico?

A Yes, I have.

Q Could you identify some of the U.S. companies for whom you have performed legal work over the last 10 years?

A I have performed all or some of the work which I described to you in a preceding question in connection with real estate for IBEC Corporation, International Basic Economy Corporation, and for Princess Properties International, which is a Bermuda based corporation, actually of American interests.

Q Who is the principal behind Princess Properties?

A It's a gentleman called Daniel K. Ludwig.

Q Please continue. I interrupted you.

THE COURT: Excuse me. Would you spell the name Ludwig.

THE WITNESS: L-u-d-w-i-g.

Q BY MR. BITTING: My question, I believe, that you were answering when I interrupted you was identify some of the American companies or the U.S. companies for whom you have performed work over the last 10 years.

A I can add IBEC is a Rockefeller family interest. Specifically, Nelson Rockefeller.

Q Now, Mr. Laffan, when were you hired in connection with your work in this case?

A Sometime in the month of January of this year.

Q And in connection with the engagement of your services as a lawyer what were you asked to do?

A I was asked to determine, under the law applicable during the period of 1839 through 1848, what were the [1014] public *rights in a body of water within a Mexican Government grant of land in California.

I was also asked to acquaint myself and determine — I would like to strike that out or restate my answer, if you will allow me, or simply correct it, whatever your procedure is.

THE COURT: You may proceed to correct your answer.

THE WITNESS: The answer is: To acquaint myself with what is referred to as the expediente of the Rancho Ballona grant and wherein is contained the transcript of the grant and the transcript of the deed of juridical possession of the lands involved in this grant and to determine what the legal significance and the basis for the juridical possession procedures is as they were related to the grant under the law applicable at the time, meaning 1839, 1840.

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[*1027] *THE COURT: The witness testified he was hired in this case in January of 1975 with respect to an investigation of Mexican law for the period 1839 through 1848, as to public rights in a body of water with in a Mexican grant of land in California. I don't quote him verbatim.

Q BY MR. BITTING: Had you finished your answer to the question, Mr. Laffan?

A Yes, I had.

Q Now, would you briefly outline the steps you took in attempting to find answers to those questions posed to you.

A I obtained from Mr. Bitting copies of the expediente, in order to review the grant, a transcript of Juridical possession of the land covered by the grant, and the related administrative and judicial proceedings.

[*1028] *I then proceeded to study, as a Mexican juris-consultant would in the period of 1839 through 1848 and as it would be done today. I determined that in this discipline the body of law applicable in its order of applicability would be the construction, legislative and executive provisions, meaning statutes, regulations, decrees, ordinances; thirdly, doctrine, which means commentators; jurisprudence, which means court rulings or judicial decisions; and finally, custom.

The research for court rulings was done by lawyers who were my assistants and was not done personally by myself. The rest of this body of law and order of applicability was studied by myself directly.

• • •

[1029] *Q Was the Constitution of 1843, together with its amendments of 1847, of assistance to you in performing your research with respect to the questions posited?

A Directly not, although it contains a couple of rules of general application in the sense that all of these Constitutions confirm the right of private property and, [1030] *two, the right of eminent domain, meaning the right of the sovereign to expropriate for public use or for the public interest in exchange for fair payment previously done, for prior payment. And also the general statement in all these that such a procedure with such a compensation was necessary in order to disturb a person in his possession, use or enjoyment of private property.

All of these also recognized the principle of no retroactivity, meaning that whatever these bodies of law represented as new law would not be applied retroactively. Otherwise, I found no direct rules which would determine the issues that I was asked to study.

Q Was the Constitution of 1836 of additional assistance to you in answering the questions posed?

A I have answered my last question in reference to the three Constitutions spoken of before. That's the Constitution of 1824, of 1836, and 1843.

• • •

[1036] *Q Now, what was the next step in your research to determine the answers to the questions posed to you by my office?

A Having followed the analytical disciplines through the years 1821 through the date of 1848, which interested [1037] us with regard to the Mexican body of law, we *then concluded that applicable on a suppletory basis to the Mexi-

can nation or within the Mexican nation at that time were the laws of the Indies, or shall we call it generally the Spanish colonial laws applicable to this part of the world, and these laws in turn by special provision of one of its statutory manifestations, in turn, made suppletory the laws of Spain in a stated hierarchy, also to the time in question and the laws in question.

Q When you use the word "suppletory", what do you mean by your use of that word?

THE COURT: Before you answer the question, would you be good enough to spell the word "suppletory".

THE WITNESS: S-u-p-p-l-e-t-o-r-y.

Suppletory, I understand, is also a concept of science of law in general, universally, and I understand it to mean that where an existing law contains a lagoon or — lagoon is the word used, and does not provide a rule, or does not define sufficiently a rule of law, the consultant then applies another law, usually of a lesser hierarchy in structure, that is, relationship, for example, of a regulation to a statute, but also historically chronologically in the sense of immediately preceding applicable laws, and this is why the term "suppletory" was used in applying Spanish law to the laws of the Indies and, in turn, as a matter of fact, not as a matter of promulgation to the Mexican period of 1821 through 1848.

[*1038] *Q Now, I believe you referred to the Indies, Mr. Laffan; which geographical area did you include within the Indies in your answer?

A The Indies in question and to which our study was directed were, specifically, the viceroyalty of New Spain which included the territories of the Californias which, in turn, includes the County of Los Angeles as it is known today.

Q By "New Spain" was that the term used by the Spanish or what is now the Republic of Mexico?

A The official title of the area from Central America way up to Oregon and other midwestern states of the United States and Texas.

Q Including Alta California?

A Including Alta California.

Q As opposed to Baja California?

A It also included Baja California.

Q And we are now situated in what was formerly known as Alta California prior to 1848?

A Yes.

Q All right. What did your research indicate to you into Spanish law as it may apply to the period, 1821 through 1848?

A I applied the same discipline which I described in one of my first replies. That is to say, addressing myself or searching for constitutional law, statutory provisions, decrees, ordinances, doctrine, jurisprudence and custom.

And in this connection I determined that the Spanish Constitution of 1812 was applied, was applicable in
[*1039] *Mexico between the periods of 1812 and 1821 and, therefore, constituted a suppletory law in the field of constitutional law during the period in question.

And this constitution contains the same general rules of guarantee of private property, indemnification, otherwise, no direct rules concerning the description of lands and waters such as we have in question.

Prior to 1812, incidentally, constitutions did not exist in the Hispanic world. That is to say, none that were promulgated.

So from constitutions we addressed ourselves to laws, regulations, decrees, et cetera and in the order of hierarchy, found what is known as the Recopilacion de Leyes de Indias, R-e-c-o-p-i-l-a-c-i-o-n, d-e, L-e-y-e-s, d-e, I-n-d-i-a-s, the original version of which was promulgated in 1680 and which was published in the last edition in the year of 1791, substantially unchanged, and, incidentally, containing over 6,000 rules of law specifically applicable to the Indies.

This body of law, in book 2, stated that the suppletory laws of the Laws of the Indies would be a series of Spanish laws dating back from late 1700 to 1348, which is the date of promulgation of the Spanish body of law known as the Siete Partidas.

The Recopilacion de Leyes de Indias or Laws of the Indies which I was spelling the name of to you a minute ago contains no provisions which are applicable on the assigned questions and the suppletory Spanish laws
[*1040] which I referred to *in the answer to this same question were also silent until we get to the law of the Siete Partidas of 1348.

The law of the Siete Partidas, which is, in its greater part a reproduction of Roman law and, in its smaller part, of medieval law and local custom. That is to say, statements of rules which were local custom, and contains rules or the rules which are directly applicable to the case in question.

Q Then, I take it, Mr. Laffan, you found nothing in the Spanish Constitution of 1812 directly applicable to the question?

A That is correct.

Q And, I take it, you found nothing in any legislative act that dealt directly with the question?

A That is incorrect to the extent that within the laws which were especially promulgated for the Indies ordinances of the viceroys which obtained pursuant to law, the latter ratification by the kings of Spain were promulgated. These were ordinances dealing directly with lands and waters, rights of individuals to lands and waters, how they were to acquire them, what would be the relation to the state and to other citizens.

THE COURT: Have you completed your answer?

THE WITNESS: Yes.

THE COURT: Before we take our recess may I ask you this, Mr. Laffan: In sum, does your testimony, to this moment, indicate that in order for you to answer

the question as to the public's rights in a body of water
[*1041] within a Mexican grant of *land in California between 1839 through 1848 that the answer lies in Las Siete Partidas?

THE WITNESS: Yes.

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[*1044] *Q BY MR. BITTING: Now, I believe, Mr. Laffan, you stated that the first reference you found that was directly applicable to the issues presented to you for research was in Las Siete Partidas?

A That is correct.

Q What particular references in Las Siete Partidas do you have reference to?

A The third law of Title XXVIII of the third Partida
[*1045] *and the sixth law, Title XXVIII of the third Partida.

Q And did you have the third law in English translation, sir?

A Yes, I do. I have an English translation here which I understand —

Q Has been marked as an exhibit?

A Yes, and which I have compared with the text of the Siete Partidas as I have found transcribed in the commentaries and which compares favorably.

THE COURT: Counsel are at the witness' side; will counsel indicate whether the witness is referring to plaintiff's 4 for identification.

MR. BITTING: No, your Honor. It is not plaintiff's 4. It is our copy. I believe it is plaintiff's 5 that I directed the witness' attention to.

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[*1049] *THE COURT: Is it your testimony that plaintiff's 5 contains not only a translation of the third law of Title XXVIII of the third Partida but, as well, the sixth law

of Title XXVIII of the third Partida; is that your testimony?

THE WITNESS: That is correct, sir.

Q BY MR. BITTING: Now, Mr. Laffan, based upon your research and your investigation have you formed an opinion as to the categories of waterways in which the public had an interest in the period 1821 to 1848?

A Yes, I have. By reading the statute —

Q Excuse me. I haven't asked you the question yet. What is your opinion with respect to that?

A My opinion is derived from the text of the statutes and laws 3 and 6 and from the commentators which I have studied who commented on these two laws.

The conclusion is that, according to these laws, the public had a property interest in the sea, seashore and in the rivers which, according to the commentators, definitely refers to running waters, to the ports and to the public roads and, as a property right is involved, therefore, the right of using these.

Additionally, the banks of rivers which were not public property but were private property were subject to a use of their banks by the public.

I am afraid I forgot the full content of your question; could I hear the question again.

MR. BITTING: I believe you have answered it but we [*1050] can *have it read again.

THE COURT: Will the reporter be good enough to read the last question put to the witness by Mr. Bitting?

(Question read.)

THE COURT: The reporter has now read the question put to you by Mr. Bitting and do you feel that you have answered that question?

THE WITNESS: Yes, I do. I have referred to those bodies of waters in which the public had an interest.

Q BY MR. BITTING: Now, turning to the second question posed to you, Mr. Laffan, what investigation did you make with reference to juridical possession?

A I studied the deed of juridical possession which recites the judicial procedure followed by a judge in order to determine the boundaries of the grant, physically, and in order to determine that there was no third party, whether individual or state interest, apparent within the pretended boundaries described by the grant and found in the judicial proceeding of walking the boundaries.

THE COURT: Have you completed your answer, sir — I will have the reporter read the last question and the answer thus far given by you and after you will have heard the question and the answer thus far given by you will you indicate whether you have completed your answer or whether you decide to add to it.

Will the reporter please do so?

(Record read.)

[*1051] THE WITNESS: Additionally, I referred to the ordinances *of the viceroys of the Indies, the first of which was dated 1536 through the 16th Century — the remaining — in order to compare the proceeding as to its due course.

The ordinances clearly indicate the formula which is to be followed by a judge in determining — or in performing the juridical possession act which I have just referred to. This involved, in detail, the convocation of all neighbors with their title instruments in hand, the presence of the court secretary, the presence of three witnesses, the distribution of the work to be performed among the neighbors and the witnesses who would hold the measuring cords, the poles, who would ride astride a horse and perform the physical review with the judge, in detail such as, in fact, the preparation of the cord which was to be used for the measurement and which was measured pursuant to a vara which was a Mexican measurement, Spanish-Mexican measurement, on the basis of its existence somewhere in the City Hall and with the use of this cord the parties proceeded to go through the

boundaries, listen to whatever each of the neighbors might claim with regard to any contest of these boundaries and review, as they marched along the grant, the legal grant of title to see that, in fact, it matched what was resulting from this deed of juridical possession.

[*1052] *I might explain that in Roman systems of law possession cannot be had by mere title. A man cannot take possession without a judicial order entitling him to take that possession; therefore, the grant by the Governor of the Department of the Californias, pursuant to the decree of colonization was not what you might describe as a complete acquisition of title, but that additionally a formal act which was recorded and inscribed in the public records and became part of a formal deed with the witnesses signing thereto has to be performed such as I have described.

The deed of juridical possession in the case of Rancho Ballona, as I have read it, follows in fact the various ordinances which since 1536 instructed how this deed was to be performed, how this act of juridical possession was to be performed.

THE COURT: Have you completed your answer, sir?

THE WITNESS: Well, I might add that my references to the ordinances in the book referred to by me previously as having been written by Mariano Galvan.

THE COURT: Have you completed your answer?

THE WITNESS: No. I might state that this is a book which restates various ordinances concerning the act of juridical possession and general provisions of these ordinances with regard to general rules to be observed by the authority, by the judicial authority involved in performing the act of juridical possession.

THE COURT: Would you once again state the title of Galvan's book.

[*1053] *THE WITNESS: The book is called "Ordenanzas de Tierras Y Aguas".

THE COURT: Have you now completed your answer to the question?

THE WITNESS: Yes, I have. I think I have.

Q BY MR. BITTING: Mr. Laffan, when you referred to the juridical procedure, what did you refer to?

A I referred to copies of an instrument that were given to me by Mr. Bitting and which are entitled — which is entitled "Transcript of the Proceedings in Case No. 69".

Q I believe it is 369.

A Sorry. 369.

And which contain the deed of grant, La Ballona, the deed of juridical possession and a transcription of various judicial and executive administrative acts concerning the existence of the land, concerning the freedom from third party claims, orders for the judge to perform a deed of juridical possession.

Q Mr. Laffan, did you compare the materials furnished to you by my office with plaintiff's exhibit 1, with the exception that there is a transmittal letter dated August 23rd, 1966?

A The answer is no, I did not compare it. I haven't had the opportunity to do that.

THE COURT: Let the record reflect that the witness appears to be taking advantage presently of the opportunity to make the comparison. Am I correct, sir?

[*1054] THE WITNESS: That is correct, except as to page 14 *which is missing from the copy that I was given, and which I have read previously this morning in this courtroom.

Q BY MR. BITTING: With reference to plaintiff's exhibit 1, is there any material on page 14 which was of additional assistance to you in your research, Mr. Laffan?

A Yes, it contains language which has to do directly with my confirmation as to the orthodoxy with which the act of juridical possession was performed and, specifically, it contains a directive by the governor to the judge and I, of course, have referred to the Spanish. I understand there are official English translations in this exhibit.

THE COURT: By "this exhibit", you are referring to plaintiff's 1?

THE WITNESS: Yes, sir, plaintiff's 1.

THE COURT: Continue.

THE WITNESS: And the specific reference is to this directive by the governor to the judge who should give possession to measure the lands pursuant to the ordinance and that any excess, any left over which may result, shall be for the nation for its convenient use. That is the one interesting content that I found.

It is further confirmatory of the orthodoxy with which the act of juridical possession was instructed to be done.

Q BY MR. BITTING: With the exception of page 14, Mr. Laffan, have you had an opportunity to compare
[*1055] *plaintiff's exhibit 1 with the materials furnished to you by my office?

A Yes, I read the content in English and in Spanish. The English which is contained in this copy of the expediente.

Q The materials furnished to you contain, according to the document, 64 pages and plaintiff's exhibit 1 contains 96 pages, so I take it with that additional exception you have not reviewed anything after page 64 in plaintiff's exhibit 1.

A No. I have not, and I will say that I felt no need to do so, because chronologically the copy that's been given to me contains the documents of the expediente which I understand to be the documents filed by Messrs. Machado and Sepulveda in court in order to establish or to confirm their claims under United States law, and these pages which I have take the reader through the point beyond the period, as I say, of documents, beyond the period of 1848.

I would presume that anything after that in this file has to do with American procedures related to the expediente.

Q Now, you reviewed the transcript of the proceedings furnished to you by my office.

Did you determine from the review of those materials that the procedure for juridical possession had been followed according to the ordinances which you found during
[*1056] the course of your research with respect to the *laying out of boundary lines for rural property?

A Yes, the act of juridical possession, according to the transcript of the deed, was performed according to the ordinances.

[*1057] *Q Now, what body promulgated the ordinances which you have referred to?

A The ordinances are the product of the viceroy who was the representative of the sovereign in the Indies and were thereafter ratified by the king, thus perfecting their promulgation and confirming the acts that were done pursuant to them.

Q Were there any particular ordinances which were of assistance to you in performing the work in connection with your testimony here?

A Well, I found directly related and of interest that in the ordinances and among the general rules which the ordinances contained as instructive of how the deed of juridical possession should be performed and what were the pursuits of the act of juridical possession, I find in quotation in the Galvan book that I have referred to earlier of a statute 2d, it is called, which states, literally, no person, notwithstanding the antiquity of his grant, may, by virtue thereof, take possession, measure or mark these territorial properties if this is not done with judicial authority and convocation of all neighbors for anything to the contrary shall be null and without effect.

Q Are you translating from Spanish?

A I am translating literally.

Now, I also found a rule 8 which states as follows:

"If the grant of lands be made to the shores of the sea, of a river or a large lagoon, the boundaries of

[*1058] said lands shall be *as of said shores and it shall be from these that the measurements shall be thrown and initiated", which I have interpreted to mean that measurements should not include sea, river or large lagoon.

Q Were there any other rules which were of assistance to you in performing your work, Mr. Laffan, in the ordinances?

A No.

Q Now, were these rules that you have just interpreted rules which were to be followed by the judge who took part in the deed of juridical posession in the case of Augustin Machado?

A Would you please repeat the question?

THE COURT: Will the reporter please read the pending question?

(Question read.)

THE WITNESS: That is correct, and in that respect, if I may, I will cite another rule which helps to answer this question.

Among the general rules of instruction is rule 11 which says — which, if I may, I will paraphrase because it is very long but if you will allow me to paraphrase a translation through it — the instruction is that before initiating any measurement of land, information as to the identity and oath shall be taken of witnesses and the parties concerned shall be present at the land which is expressed in the grants. They shall see it. They shall recognize it by its signs and shall testify as to the distances and as to the jurisdiction that it lies in and as to everything else that meets the eyes.

[*1059] *Having compared these signs with those contained in the title, the judge and the scrivener — secretary of the court — the court clerk — shall proceed to measure as hereinafter set forth.

And then the author, in fact, abbreviates the procedure but, in fact, states the procedure which is substantially

that followed in the act of juridical possession of the Rancho Ballona as it appears in the deed and this is the procedure to which I referred to in answering an earlier question. Measurement. Cords. The manner in which the physical walking of the boundaries was performed.

[*1060] *Q And, I take it, based upon your investigation and your review of the transcript in the matter of Augustin Machado, did you reach an opinion as to whether or not the ordinances relating to juridical possession were followed in the case of the grant by the Governor of California to Machado?

A Everything indicates that the ordinances were followed. The correct number of witnesses and the substantial acts required by the ordinances appears transcribed in the deed of juridical possession.

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CROSS-EXAMINATION

BY MR. PARRILLE:

Q Mr. Laffan, in discussing Rule 8 of the Galvan book, you indicated that the measurements did not include "large lagoon."

By that, sir, what do you mean, or what was your understanding of what was meant at that time?

A Well, my understanding, of course, would have to be subject to the general laws applicable to lands and waters and which were in effect, the rules of law of the Siete Partidas as we have referred to them, as I have

[*1061] *referred to them earlier. Rule 3 and Rule 6.

See if I can help you. I would interpret that the expression "large lagoon" was perhaps somewhat gratuitous in the sense that it was not defined or clarified and that certainly ran outside what was the clear law of the Siete Partidas that individuals could not own the sea, the seashore, running rivers, ports, and the roads of the nation.

Q I am not sure if I still understand what the meaning of the term "large lagoon" would be. Can you frame it in such a way or has your research indicated what the term "large lagoon" would be?

A I would have to say no. I would say that my ability to interpret the phrase, even in Spanish, of that era, called "large lagoon" is probably no better qualified than yours from a geographical point of view.

From a legal point of view, I would be forced to think that the author is referring to a lagoon which is navigable and which has an access from without the properties of the grant. This would be my legal interpretation of the phrase under the laws applicable at the time.

Needless to say, I have found no commentators on the detailed phrase "large lagoon" as quoted by Galvan from the corresponding ordinances.

Q Is it true, sir, under Las Siete Partidas, that certain surface waters belonged to the people or the public?

A Yes, that is correct.

Q Would that be true if those waters were lying
[*1062] *over private lands?

A I cannot answer your question, because it does not fall within my understanding of what the law is.

The law of Siete Partidas is the applicable law. The rules of law 3 and law 6 that we have referred to are specifically the rules which are applicable. These rules state compounded that the public owns the sea, seashore, running rivers, with regard to water. I suppose — and the ports. Okay.

Which, incidentally, is substantially the same rule as existed in Roman law. Anything else than that which is expressed in those laws was the subject of private property, because it was certainly the general rule of law in the period from the date of the Siete Partidas to 1848, that what the sovereign did not reserve for itself in its laws for itself, belonged to individuals, and the reservation ex-

pressed which is made in the laws is the sea, the rivers that run and the bays, ports.

• • •

[*1080] *Q Can the public own waters over private lands under Las Siete Partidas in California in the 1830's?

A The answer to that question would have to be no because under the applicable law, which is the Las Siete Partidas, the public owned only the sea, the harbors and the running rivers and to the extent that you can put a sea or a harbor or running river in a private land, the answer to your question might still not make any sense because that would not be included in private land, these bodies.

An individual could have never have acquired title to such bodies of water.

Q Assuming a lake such as in Mexico City, under the laws in effect in 1830 in California, would the waters have been public waters?

A Enclosed in a man's property?

Q Yes, sir.

A I repeat again the rules are that the public owns the sea, the bays and the running waters. Lakes would not be included in such description.

[*1081] The law is limited in the sense that what the *public owns is what the law expresses. Nothing else does it own.

• • •

Q Sir, under the law in force in Mexico in 1839, if lands were covered and uncovered daily by the tide water of the Pacific Ocean, who would own those tidelands?

A As the Siete Partidas state, if they are the shore of the sea the public owns the shore of the sea.

• • •

[*1084] *Q Under Las Siete Partidas, what were some of the servitudes that the public had in private lands?

A I have not acquainted myself with detailed provisions of that law with regard to servitudes. I have assumed that they include those that we know today and, in fact, otherwise, I know as a matter of law, existed at the time in the 1800's, which is the right to transit and perhaps the right to take water therefrom or perhaps the right to remove sand, this sort of a servitude. The right to transmit water over it through an aqueduct, and we would have to say that the uses that are set up in law 6 might also be described as servitudes, fall into servitudes, that is to say that the river banks would be subject to the use by the public as described in law 6, where they could debark and lay their fish out and rest or trade or dry their sales, or whatever. This would be considered a servitude.

[*1085] *Q You have read the expediente, I believe; is that correct?

A Yes, I have.

Q In the expediente, Governor Alvarado granted Rancho Ballona to the Talamantes and Machados without prejudice to enclosing the traversing roads and servitudes. What does that mean to you?

A Well, it represents an expression of art which appears in deeds of conveyance even today, where rights of the public are saved in the conveyance of large tracts of land by the authorities.

That is to say, there may have been expressly constituted rights of traverse on this land or such right and which at the time may not be known to the governor as he is writing this thing, so he is saving his ignorance.

Q If I understand your testimony, then, it would be possible for a right in the public to exist which would not be specifically spelled out by the governor.

A This is correct.

Q Could a servitude in Mexican law apply to the waters affected by the tides.

A I can't answer that question, because I am not especially acquainted at this time with water rights, and I understood your question to be addressed to water.

Q Yes, sir.

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*1087] *REDIRECT EXAMINATION

BY MR. BITTING:

Q Mr. Laffan, in 1839 would a body of water subject to public uses be included within the boundaries of a grant of land from the Mexican sovereign to a Mexican citizen?

A No.

Q What are the reasons for that answer?

A Because the applicable law which is the Las Siete Partidas states very clearly and in a limited way that running bodies of water, bays, the sea, are not subject of private domain. That is to say that they are of the public domain, with the implication — if I may add — that the sovereign has no power to convey a property interest in such bodies of water.

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No. 82-708

IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,
Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

On Writ of Certiorari to the Supreme Court of California

SUPPLEMENT TO JOINT APPENDIX

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PETITION FOR CERTIORARI FILED
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Relevant Docket Entries

Description	Date Filed
Complaint for Declaratory Relief and to Quiet Title, C.T. 1-14*	September 13, 1965
Answer of the State of California, C.T. 15-25	January 5, 1966
Answer of Defendant Hughes Tool Company, C.T. 27-36	January 7, 1966
Answer of Defendant Southern California Gas Company, R.T. 37-42	September 10, 1969
Answer of Defendant Venice Peninsula Properties, R.T. 104-113	February 24, 1975
Cross Complaint of the State of California for Declaratory Relief and to Quiet Title, C.T. 115-120	February 27, 1975
Answer of Cross Defendant Southern California Gas Company to Cross Complaint of the State of California for Declaratory Relief and to Quiet Title, R.T. 152-155	March 11, 1975
Answer to Cross Complaint of the State of California for Declaratory Relief and to Quiet Title [City of Los Angeles], C.T. 158-161	March 14, 1975
Answer of Defendant Venice Peninsula Properties to Cross Complaint of the State of California, R.T. 164-167	March 18, 1975

* "C.T." refers to Clerk's Transcript on Appeal in the state court.

Description	Date Filed
Answer of Defendant Summa Corporation to Cross Complaint of the State of California, C.T. 169-173	March 21, 1975
Answer of Cross Defendants Ruth Jones Wright and Robert D. Byrne and Byrne C. Manson, as Trustees under the Will of Olive Byrne Jones, Deceased, to Cross Complaint of the State of California for Declaratory Relief and to Quiet Title, R.T. 176-179	March 31, 1975
Resting of Case by State of California, C.T. 289	July 14, 1975
Notice of Intended Decision, C.T. 477-479	November 18, 1975
Minute Order Announcing Intended Decision, C.T. 480	November 18, 1975
Minute Order Vacating Intended Decision, C.T. 485	June 25, 1976
Revised Notice of Intended Decision on Certain Factual Issues Tried in Connection with the First Stage of the Bifurcated Trial, C.T. 492-494	October 19, 1976
Findings of Fact and Conclusions of Law, C.T. 561-580 (Reprinted at A50-A65 of Appendix to Petition for Certiorari)	February 22, 1977
Judgment After Trial by Court, C.T. 581-599 (Reprinted at A66-A89 of Appendix to Petition for Certiorari)	October 11, 1977

Description	Date Filed
Notice of Entry of Judgment, C.T. 600	October 12, 1977
Minute Order Denying Motion for New Trial, R.T. 666	December 5, 1977
Notice of Appeal, C.T. 667-668	December 29, 1977
Opinion of the Court of Appeal (Reprinted at A35-A49 of Appendix to Petition for Certiorari)	March 25, 1981
Opinion of the Supreme Court (Reprinted at A1-A32 of Appendix to Petition for Certiorari)	May 10, 1982
Order of the Supreme Court Denying Rehearing (Reprinted at A33 of Appendix to Petition for Certiorari)	June 16, 1982
Judgment of the Supreme Court (Reprinted at A34 of Appendix to Petition for Certiorari)	June 17, 1982

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IN THE

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SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S BRIEF IN OPPOSITION.

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Questions Presented.

1. Where precedent established by this Court as early as 1900 holds that a patent issued by the United States in confirmation of a title derived from a Mexican grant is merely a recognition of that preexisting title and is not an original source of title, and where that same precedent is consistent in establishing the principle that for this reason no federal question is involved in determining rights to such land, should this Court consider such a state-law question on a writ of certiorari?

2. Where, pursuant to this Court's conclusion that no federal question is involved in determining the nature and quality of title of a Mexican confirmatory patentee, a state supreme court has applied state law to articulate rights to such land, does this Court have jurisdiction to consider this state-law decision on a writ of certiorari?

3. Where the confirmatory patent issued to petitioner's predecessors contains repeated references to the existence of an "inner bay" in its property description and an extensive lagoon is shown on the plat incorporated into the patent, is it a collateral attack on the patent to allow proof of the lagoon's existence to clarify the ambiguity arising when the patent is considered in light of statements made in proceedings leading to the issuance of the patent?

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No. 82-708

IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION.

Respondent State of California ex rel. State Lands Commission hereby submits its brief in opposition to the petition for a writ of certiorari, which seeks review of the decision of the California Supreme Court in this case.

Opinion Below.

The opinion of the California Supreme Court is reported at (1982) 31 Cal.3d 288, 644 P.2d 792, 182 Cal.Rptr. 599.[1]

[1]The opinion of the Court of Appeal, an intermediate state court, was superseded by the granting of a hearing by the California Supreme Court. This vacated opinion was therefore not published in the Official Reports in accordance with California Rules of Court, Rule 976(d).

Jurisdiction.

Petitioner seeks to invoke this Court's jurisdiction under 28 United States Code section 1257(3). For the reasons set forth below, this Court lacks jurisdiction to consider the questions raised in the petition.

Statute Involved.

For purposes of the jurisdictional question, consideration of 28 United States Code section 1257(3) is required:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . . .
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Additionally, respondent will make reference to the Treaty of Guadalupe Hidalgo (9 Stat. 922) and the Act of March 3, 1851 (9 Stat. 631), set forth in Petitioner's Appendix, pp. A-90 - A-114, only to demonstrate that neither is involved in the instant case.

Statement.

Under settled California law, a person possessing fee title to tide or submerged lands[2] holds that title subject to a public trust easement for purposes of commerce, navigation and

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[2] "Tidelands" are lands between the line of mean high tide and mean low tide; "submerged lands" are those seaward of mean low tide. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 478 n. 13, 476 P.2d 423, 434 n. 13, 91 Cal.Rptr. 23, 34 n. 13.)

fisheries. (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 606 P.2d 362, 162 Cal.Rptr. 327, cert. denied, 449 U.S. 840; *Marks v. Whitney* (1971) 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 476 P.2d 423, 91 Cal.Rptr. 23; *People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79; *Forestier v. Johnson* (1912) 164 Cal. 24, 127 P. 156; *Oakland v. Oakland Waterfront Co.* (1897) 118 Cal. 160, 50 P. 277.)

This is the case even though the patent conveying fee title to the property does not contain an explicit reservation of this interest. (See, *e.g., City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 606 P.2d 362, 162 Cal.Rptr. 327, cert. denied, 449 U.S. 840; *People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79.)

The reason for this implied-in-law easement is twofold. It stems from a recognition of the unique character of tide and submerged lands, and the fact that under the common law all such property is subject to the public right to use the waters. (See, *e.g., Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387; *People v. Kerber* (1908) 152 Cal. 731, 93 P. 878.)

Indeed, legal systems since the Roman Empire have similarly treated such lands. (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521, 606 P.2d 362, 364-365, 162 Cal.Rptr. 327, 329-330, cert. denied, 449 U.S. 840; Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right* (1980) 14 U.C. Davis L. Rev. 195, 196-198; Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine* (1970) 79 Yale L.J. 762, 763-772.)

The holder of fee title to such lands has the right to make any use of the property he sees fit in the absence of the

exercise of the retained public trust easement. (*State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, 249, 625 P.2d 256, 261, 172 Cal.Rptr. 713, 718-719, cert. denied, 454 U.S. 865; *State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, 232, 625 P.2d 239, 252, 172 Cal.Rptr. 696, 709, cert. denied, 454 U.S. 865; *Newcomb v. City of Newport Beach* (1936) 7 Cal.2d 393, 402, 60 P.2d 825, 829; *People v. California Fish Co.* (1913) 166 Cal. 576, 599, 138 P. 79, 88.) And where improvements have been placed or constructed on such lands by the fee title owner, the State must compensate the owner for such improvements before exercising the trust. (Calif. Pub. Res. Code § 6312; *People v. California Fish Co.* (1913) 166 Cal. 576, 599, 138 P. 79, 88.) (Petitioner has acknowledged this fact (Pet., p. ii, n. 1),[3] by noting that although Southern California Gas Company had been a party to the proceedings below on the basis of its ownership of a pipeline easement, it has elected not to pursue further review of the state court judgment, satisfied that its improvements are protected by the compensation provided for in California Public Resources Code section 6312.)

Indeed, cities have been built on such lands in California notwithstanding the quality of the fee title by which they are held. (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 524, 606 P.2d 362, 367, 162 Cal.Rptr. 327, 332, cert. denied, 449 U.S. 840; Note, *Increased Public Trust Protection for California's Tidelands — City of Berkeley v. Superior Court* (1980) 14 U.C. Davis L. Rev. 399, 424-426.)

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[3] "Pet." refers to the petition for a writ of certiorari filed by petitioner in the instant case. "App." refers to petitioner's appendix to its petition for a writ of certiorari. "R.T." refers to the Reporter's Transcript of the trial proceedings. "Exh." refers to the exhibits admitted into evidence at trial.

This case concerns such tide and submerged lands, an estuary referred to as Ballona Lagoon,[4] located within the Mexican land grant of Rancho La Ballona granted to Augustine and Ignacio Machado and Felipe and Tomas Talamantes in 1839. The grant set forth the following reservation:

> "They may enclose it *without prejudice* to the traversing roads and *servitudes* . . . ." (Exh. 1, pp. 20-22, Grant for Rancho La Ballona; App. A-1, p. A-9; emphasis added.)

This language of the grant was incorporated by reference into both the Decree of Confirmation issued by the Board of Land Commissioners, and the decision upholding the decree rendered by the United States District Court in the federal rancho confirmation proceedings for Rancho La Ballona. (Exh. 1, pp. 61-63, 83-84; App. A-5, p. A-58.)

At trial, expert testimony established that under Mexican law, such a reservation "represents an expression of art which appears in deeds of conveyance even today, where

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[4]Ballona Lagoon was found by the courts below to be an arm of the sea, inundated with tidewaters at both mean low and high tides. Tidegates have recently been installed to control the flooding of adjacent land, but the lagoon is still of sufficient depth to be navigable by shallow draft vessels and is the sole source of seawater for the Venice Canals. Moreover, Ballona Lagoon has value for scientific study and research as an estuarine area of ecological importance. Indeed, the waters of the lagoon are a habitat for a variety of migratory birds and marine life. Furthermore, access to the lagoon is provided by walkways surrounding the shore, public streets to the shoreline, and bridges across the lagoon. Consequently, members of the public have used Ballona Lagoon for more than five years for purposes consistent with the public trust easement such as clam-digging, swimming, boating and scenic enjoyment. (App. A-1, p. A-2; App. A-5, pp. A-52 - A-58.)

Rather than accept these factual findings made by the state courts, petitioner has made factual allegations throughout its petition (Pet., pp. 3, 4, 7, 8, 10-11) which are not supported by the findings of the courts below, some of which in fact were rejected by the courts below, and are therefore clearly improper. (See *Portland Ry. Co. v. Oregon R. R. Comm.* (1913) 229 U.S. 397, 411.)

rights of the public are saved in the conveyance of large tracts by the authorities." (R.T. 1085; emphasis added.) Furthermore, the expert established that the public rights of common usage contained in Las Siete Partidas,[5] the law of Mexico at the time of the grant, would be considered servitudes. (R.T. 1084.)

Thus, under Mexican law, rights of the public in tide and submerged lands were not only recognized, they were safeguarded in conveyances to private parties. The California Supreme Court therefore concluded that when California was ceded by Mexico, the title of petitioner's predecessors was indeed subject to the interests of the public in the tidelands included in the grant.

Notwithstanding petitioner's insinuation to the contrary (Pet., p. 13, n. 13), the state court's conclusion that under Mexican law (Las Siete Partidas) tidelands if alienated remained subject to a retained public trust interest is correct. For example, in *Apalachicola Land & Development Co. v. McRae* (1923) 86 Fla. 393, 98 So. 505, appeal dismissed, 269 U.S. 531, the court stated:

> "[Under Las Siete Partidas] a grant or concession of lands under navigable waters and tide lands was not in accord with usual customs of the Kingdom, such lands and waters being held as res communes for the *public use*; and a conveyance of them to private ownership could be consummated only by a clear showing

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[5]Law III of Title XXVIII of Las Siete Partidas, the law in effect when California was a part of Mexico, provided, "The things which belong in common to the creatures of this world are the following, namely, the . . . sea and its shores, for every living creature can use each of these things according as it has need of them. For this reason every man can use the sea and its shore for fishing or for navigation, and for doing everything there which he thinks may be to his advantage." Law VI provided, "Rivers, harbors, and public highways belong to all persons in common . . . ." (Las Siete Partidas, CCH (Spain) (1931) pp. 820-821.)

> of express sovereign intent (see Jover y Costas v. Insular Government of the Philippine Islands, 221 U.S. 623, 31 Sup.Ct. 664, 55 L.Ed. 884); and *even this would not exclude the public use of the lands and water and the natural products thereof*[.]" (86 Fla. at 433, 98 So. at 518; emphasis added.)[6]

Again emphasizing that under Las Siete Partidas a tidelands grant conveyed fee title or "jus privatum" subject to the rights of the public or "jus publicum," the court in *Apalachicola* held:

> "[Pursuant to Las Siete Partidas if the sovereign] had granted, or had expressly authorized a grant of submerged lands below high-water mark on the bays of the sea, such a grant might under some circumstances carry a bare legal title, but not a right of private ownership in submerged lands under the waters of the bay or sea, thereby excluding navigation, fishing, the taking of oysters or other shell fish, and other purposes in which the public have an interest as of common right, subject to governmental regulation for the good of the public." (86 Fla. at 451, 98 So. at 524.)

When sovereignty over California passed to the United States in 1848, the United States was obligated by the Treaty of Guadalupe Hidalgo to respect Mexican property rights and insure that Mexicans "enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States." (9 Stat. 922, 929, Art. VIII; App. B-1, p. A-96.)

This treaty obligation was fulfilled when Congress passed the Act of March 3, 1851, "to ascertain and settle the private

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[6]From this it is seen that petitioner's reliance on *Jover v. Insular Government* (1911) 221 U.S. 623, for the proposition that Mexican law permitted alienation of tidelands without any retained public trust rights (Pet., p. 13, n. 13), is misplaced.

Land Claims in the State of California." (9 Stat. 631; App. B-2, pp. A-108 - A-114.) Petitioner's predecessors obtained confirmation of their title to Rancho La Ballona in proceedings conducted pursuant to this Act. The confirmatory patent issued as a result of these proceedings contained a plat showing Ballona Lagoon as an "inner bay" of the Pacific Ocean within the rancho and its legal description made repeated references to the "inner bay's" existence. (Patent for Rancho La Ballona, App. C-1, pp. A-115 - A-123; Plat of Rancho La Ballona, App. C-2, p. A-124.)

Despite these references to the existence of Ballona Lagoon within the rancho, despite the fact that the original Mexican title was conveyed subject to a public trust, and despite the nature of California's common law respecting title to such tidelands, petitioner argues herein that it should have a quality of title greater than that held by its predecessors under Mexican law and *more ample* than that enjoyed by citizens of the United States.

However, the cases cited by petitioner for its argument are inappropriate to the issue of the public trust's existence. In fact, the existence of the public trust easement impressed on lands under a previous sovereign is not even addressed by the cases upon which petitioner relies. Yet such cases have arisen. In those instances, it will be demonstrated below that both this Court and the California Supreme Court have recognized that the public trust easement over such lands continues to exist.

Summary of Argument.

There is no jurisdiction in this Court because the Equal Footing Doctrine issue was raised for the first time in this petition. Not having been raised, it was not decided below.

Accordingly, this Court lacks jurisdiction under 28 United States Code section 1257 to consider this issue.

Further, the real issue in this case is solely a matter of state law, conferring no jurisdiction on this Court. That issue is whether petitioner's fee title, deraigned from a Mexican rancho grant, is subject to an easement for commerce, navigation and fisheries in favor of the public in view of the fact that when petitioner's predecessors received the grant from Mexico it was subject to such rights, and in view of California's policy of upholding public trust interests.[7] This Court has consistently ruled that such questions concerning the nature and quality of titles derived from Mexico are not federal questions, but questions of state law. Significantly, these holdings have been delivered in the course of dismissing writs of error for lack of jurisdiction and affirming dismissals for want of a federal question. (*Los Angeles Milling Co. v. Los Angeles* (1910) 217 U.S. 217; *Devine v. Los Angeles* (1906) 202 U.S. 313; *Hooker v. Los Angeles* (1903) 188 U.S. 314.) Respondent submits the same action is warranted herein.

Additionally, this Court has uniformly held that public rights arising under a prior sovereign need not be presented for confirmation; petitioner's argument to the contrary is therefore unavailing. (Pet., pp. 13-15.) In fact, quite counter to petitioner's contention, the jurisdiction of the confirmatory bodies was limited and did not extend to consideration of the existence of the public trust on tidelands within

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[7]It should be noted that the trial court based its judgment on other state grounds in addition to the public trust, each of which independently sustains the existence of public rights in Ballona Lagoon. The California Supreme Court did not discuss these issues since the rights are included within the public trust. (App. A-1, p. A-16.) However, as conceded by petitioner (Pet., p. 8, n. 11), these implied-in-fact and implied-in-law public easements do exist in Ballona Lagoon by virtue of the trial court judgment. (App. A-6, pp. A-68 - A-69.)

ranchos. Presentation of this interest thus would not have served to confirm it and, conversely, the failure to present this interest could not have served to extinguish it. (*Townsend v. Greeley* (1866) 72 U.S. (5 Wall.) 326; *Fremont v. United States* (1854) 58 U.S. 541.) Indeed, public trust interests cannot be disregarded, abandoned or extinguished. (*Eldridge v. Trezevant* (1896) 160 U.S. 452; *New Orleans v. United States* (1836) 35 U.S. (10 Pet.) 662.)

Finally, the evidence proving the existence of Ballona Lagoon is not a collateral attack on the patent issued to petitioner's predecessors. The evidence merely corroborates the description and depiction of the lagoon already contained in the patent. Since the patent, the final record of the property confirmed to petitioner's predecessors, on its face describes a parcel of property containing an arm of the sea (App. C-1, pp. A-118 - A-119, A-122; App. C-2, p. A-124), petitioner should not now be heard to complain that federal surveys also depict the lagoon, and core samples attest to its age, especially since petitioner itself does not dispute the lagoon's existence.

REASONS WHY THE WRIT SHOULD BE DENIED.

I.

Petitioner Did Not Raise Below the Equal Footing Doctrine Question.

This Court lacks jurisdiction to consider a federal question under 28 United States Code section 1257 unless that question was raised and decided below. (*Cardinale v. Louisiana* (1969) 394 U.S. 437, 438.) Here the question posed by petitioner respecting the Equal Footing Doctrine was neither raised nor decided below.

Petitioner states that an analysis of the Equal Footing Doctrine is central to a determination of whether its property is subject to a public trust. (Pet., pp. 2, 12.) This doctrine, however, was never raised as a federal question or in any other manner by petitioner at any point in the state proceedings, even in its petition for rehearing in the California Supreme Court.

Furthermore, there is absolutely nothing in the state court's opinion that indicates the court considered the Equal Footing Doctrine as an issue in the case, or more particularly, as invoking a federal question. Certainly petitioner did not make it an issue, nor does petitioner now claim that it did. Rather, the entire case below was based on an analysis of petitioner's title and not an examination of the quality or nature of the State's interest or issues associated there-

with. Consequently, the Court lacks jurisdiction to consider this matter.[8]

II.

The Nature and Extent of the Property Rights of a Property Owner Whose Title Is Predicated on a Mexican Grant Is Determined by State Law. No Federal Question Is Presented.

Petitioner is attempting to raise issues long ago settled by this Court regarding the choice of law to be used in determining the nature and extent of rights conveyed to a party by a prior sovereign. (Pet., pp. 10-15.)

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[8]In any event the Equal Footing Doctrine does not of itself create a federal question because its very purpose is to put California and the other subsequently admitted states on an "equal footing" with the original thirteen states. (*Coyle v. Smith* (1911) 221 U.S. 559.) As a result, each later admitted state equally with the original thirteen has always possessed the power to formulate its own domestic body of real property law. (*Davies Warehouse Co. v. Bowles* (1944) 321 U.S. 144, 155.)

To accept petitioner's position that the Equal Footing Doctrine can itself raise a federal question would constitute a total subversion of this principle and would subject all of California's land title rules to some superior federal supervisory power inasmuch as, as noted by petitioner, "[c]onfirmed Mexican grants form the basis of title to much of the land in California." (Pet., p. 3.)

For this reason the idea that the scope and applicability of the Equal Footing Doctrine can raise a federal question was expressly rejected by this Court in *State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363. The Court reasoned that if the Equal Footing Doctrine itself required interpretation so as to create special federal common law on the subject, all later admitted states would be treated differently from the original thirteen, there being no "Equal Footing Doctrine" applicable to them. Since the doctrine was created to insure equality among the states, this approach, according to the *Corvallis* Court, would result in a "perverse application of the equal-footing doctrine." (429 U.S. at 378.)

Most recently, *Corvallis* was specifically applied to reject a claim identical to petitioner's in the case of *Hyman v. State Lands Com'n of State of Cal.* (C.D. Cal. 1982) 543 F.Supp. 118, appeal pending 9th Cir. There the court held that the Equal Footing Doctrine does not create a federal question not only on the basis of the *Corvallis* decision, but also because the vesting of sovereignty in new states upon their admission to the Union cannot be equated to the right of ownership conveyed by a federal grant which is thereafter governed by federal law. The court explained that "grant" implies a choice on the part of the grantor to convey or not to convey, but Congress had no such choice since it was powerless to withhold from new states any aspect of sovereignty. (543 F.Supp. at 121-122 n. 4.) Petitioner's argument should therefore be rejected again herein.

Nearly 100 years ago this Court established the principle that a dispute as to the nature and extent of property rights gained under patents issued by the United States in confirmation of prior Mexican grants did not present a federal question but was a matter of state law. (*Los Angeles Milling Co. v. Los Angeles* (1910) 217 U.S. 217; *Devine v. Los Angeles* (1906) 202 U.S. 313; *Hooker v. Los Angeles* (1903) 188 U.S. 314.)

Like the instant case, *L.A. Milling* and *Hooker* were before this Court to review decisions of the California Supreme Court determining rights in property. In *Devine*, the action had been filed in federal court and dismissed for want of a federal question. In each case the parties claimed under Mexican land grants recognized by confirmatory patents of the United States. This Court dismissed the writs of error in *L.A. Milling* and *Hooker* for lack of jurisdiction and affirmed the lower court's dismissal in *Devine*, declaring that the invocation of the Treaty of Guadalupe Hidalgo, the Act of March 3, 1851, and a United States patent issued pursuant to the Act all failed to raise federal questions.

It should be noted that these were quiet title actions concerning the nature and extent of water rights in those portions of the Los Angeles river running through property conceded to be privately owned but as to which the city claimed rights for the public. Likewise in this case, fee title to the property is not in issue; the only issues raised concern the nature and extent of petitioner's rights in the property vis-a-vis the public.

In *L.A. Milling*, *Hooker*, and *Devine*, the Court analyzed each of the sources of federal jurisdiction urged by the private parties and rejected each for the following reasons:

(1) The Treaty of Guadalupe Hidalgo does not require the application of federal law because the controversy does not involve construction of the treaty, but rather

determination of the rights which in fact existed under Mexican law that were protected by the treaty. (188 U.S. at 318.)

(2) The Act of March 3, 1851, is not the source of the applicability of federal law because neither its validity nor its construction has been challenged. Furthermore, the Act did not originate federal rights or titles. The Act established the mechanism by which preexisting Mexican property claims would be confirmed by the United States through the issuance of a patent. (202 U.S. at 337.)

(3) Determination of the nature and quality of title gained under patents issued pursuant to the Act does not rest on federal law because such patents are not original sources of private titles, but are merely confirmatory of rights already accrued under the former sovereign. (217 U.S. at 233.)[9]

Thus the treaty, the federal Act and the patent do not raise federal questions because their validity is not being challenged and because they did not create independent sources of title requiring interpretation under federal law. Rather questions as to the nature and extent of a confirmee's property rights were specifically left for state law determination. This Court has expressly so held:

> "In truth, the questions as to the nature and extent of complainants' titles or rights, [derived from Mexico by virtue of grants to their predecessors and confirmed

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[9]In *Boquillas Cattle Co. v. Curtis* (1909) 213 U.S. 339, and *Adam v. Norris* (1880) 103 U.S. 591, 593, this Court had previously squarely held that by its confirmatory patent the United States did not pass a federal title or grant or convey a federal interest, stating in *Boquillas*:

> "[W]hile it is true that in *Beard v. Federy*, . . . Mr. Justice Field calls such a patent a quit-claim, we think it rather should be described as a confirmation in a strict sense." (213 U.S. at 344.)

by the United States through its patent], are not Federal questions, but questions of state or general law.

"In *Hooker v. Los Angeles, supra*, it was contended that the decision of the state court against the claim of plaintiffs in error to certain riparian rights and in certain alleged percolating waters, which rights were alleged to be derived from a patent of the United States, and confirmed Mexican grants, was a decision against a title, right, privilege, or immunity claimed under the Constitution or some statute or treaty of the United States, and so reviewable here. But this court held otherwise, and we said:

" 'Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final. . . .' " (202 U.S. at 337.)

Just eight months ago this principle was again reaffirmed in *Hyman v. State Lands Com'n of State of Cal.* (C.D. Cal. 1982) 543 F.Supp. 118, appeal pending 9th Cir., a case substantially similar to the case at bar. As herein, plaintiffs in *Hyman* attempted to raise in federal court the issue of whether a public trust exists on tide and submerged land located within a former Mexican rancho. The body of water involved in *Hyman* was Del Rey Lagoon, a portion of the same historic Ballona Lagoon as is the subject matter of the instant case. Moreover, plaintiffs in *Hyman* traced their title to the same Mexican rancho grant as does petitioner herein, and, indeed, claimed federal jurisdiction by virtue of the same federal confirmatory patent as does petitioner herein.

In an opinion relying on the authority articulated by this Court in the above line of cases, Judge Mariana Pfaelzer concluded that no federal question is raised by the issue of whether, as a matter of state common law, a public trust

exists on tidal, submerged lands located within a confirmed Mexican rancho. The court stated:

> "Supreme Court precedent, from 1900 to 1977, is controlling here. It is consistent in establishing the principle that no federal question is involved in determining rights to land held privately at the Mexican conquest and subsequently confirmed and patented by the United States." (543 F.Supp. at 122.)

The *Hyman* case was therefore dismissed for lack of federal jurisdiction.

Thus where, as here, title is derived from a Mexican grant the nature and extent of rights belonging to persons holding confirmatory patents is a matter of local law.

The Mexican land grant confirmatory patent case is in sharp contrast to cases wherein the original source of private title is deraigned from the United States itself, as in *Borax, Ltd. v. Los Angeles* (1935) 296 U.S. 10. In *Borax* the city brought an action to quiet its title to tidelands which it claimed under a legislative grant from the State. The defendant claimed under a patent issued by the United States to its predecessors. There the patent from the United States was not simply a confirmation of a prior Mexican grant, but an outright grant by the United States of public lands owned by it. Federal common law was therefore applied to determine the initial boundaries of the federal patent.

Noting the clear distinction between these two types of cases and the consequent inapplicability of federal law to the Mexican land grant case, such as the case at bar, the court in *Carpenter v. City of Santa Monica* (1944) 63 Cal.App.2d 772, 147 P.2d 964, stated as follows:

> "Under the authority of [Borax], if appellant claimed through a federal grant in the proper sense, there could be no doubt that the question involved would be governed by the federal and not the state law. But that rule

> only applies where title is derived from the United States. In the present case appellant did not deraign title from the United States at all. The title was predicated upon a Mexican grant. The issuance of the patent thereafter pursuant to an act of Congress was but confirmatory of the Mexican grant in performance of our government's obligations assumed under the Treaty of Guadalupe Hidalgo. The United States never had the true ownership of the property, and in no proper sense was it the grantor or the source of appellant's title. . . ." (63 Cal.App.2d at 784, 147 P.2d at 970.)

State law was therefore applied.

Likewise herein, the United States never had the true ownership of the property and in no sense was it the grantor or source of petitioner's title. Thus the issue herein concerning the nature and extent of petitioner's title or rights in property is not a federal question, but a question of state law. (*Los Angeles Milling Co. v. Los Angeles* (1910) 217 U.S. 217; *Devine v. Los Angeles* (1906) 202 U.S. 313; *Hooker v. Los Angeles* (1903) 188 U.S. 314; *Chrystal Springs Land & Water Co. v. Los Angeles* (1900) 177 U.S. 169; *Townsend v. Greeley* (1866) 72 U.S. (5 Wall.) 326; *Hyman v. State Lands Com'n of State of Cal.* (C.D. Cal. 1982) 543 F.Supp. 118, appeal pending 9th Cir.)

The decision of the California Supreme Court, resting as it does on state law, is in keeping with this Court's mandate that state courts determine the nature and quality of title held by a Mexican confirmatory patentee as a matter of state law. Thus no federal question has been presented by petitioner.

III.

The Public Trust Was Not Required to Be Presented for Confirmation Since Such Rights Were Not Within the Ambit of the Act of March 3, 1851, and Thus Not Within the Jurisidiction of the Boards Created Pursuant to It.

This Court has consistently ruled that trust interests were not within the jurisdiction of the Boards created to determine the validity of private land grants made by prior sovereigns.[10] Thus no federal question is raised by the failure of the Board of Land Commissioners to consider such an interest. (*Townsend v. Greeley* (1866) 72 U.S. (5 Wall.) 326; *Fremont v. United States* (1854) 58 U.S. 541; *New Orleans v. United States* (1836) 35 U.S. (10 Pet.) 662.)

Recognizing that public rights in waterways existed under Mexican sovereignty, petitioner argues that the public trust on Ballona Lagoon was extinguished because it was not presented to the Board of Land Commissioners for confirmation pursuant to the Act of March 3, 1851. (Pet., pp. 13-15.) Petitioner is incorrect. Under the 1851 Act, the Board of Land Commissioners was charged only with determining the validity of the fee title. Questions concerning the nature and quality of title, such as whether it was subject to a public trust, were not within the jurisdiction of the Board.

This principle was enunciated by this Court just three years after the passage of the Act. In *Fremont v. United States* (1854) 58 U.S. 541, a case concerning fee title to Rancho Mariposas, a question arose as to the right to minerals in the land. The Court held that the minerals issue had

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[10]Even petitioner concedes that trust interests were not required to be presented to the Board of Land Commissioners and that such interests were not discharged by the confirmation and subsequent patent. (Pet., p. 14, n. 18.)

to be tried separately from issues relating to the underlying fee title, reasoning that since the question of minerals had not been before the Board of Land Commissioners by the Act of 1851, its jurisdiction having been limited to fee title, the minerals issue was not properly before the Court on appeal of its decision. In the words of the Court:

> ". . . The only question before the court is the validity of the title. And whether there be any mines on this land, and, if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court, by the act of 1851." (58 U.S. at 564.)

In *Townsend v. Greeley* (1866) 72 U.S. (5 Wall.) 326, this Court again held that only legal titles and boundaries were questions for determination in the confirmation proceedings, and that the extent of rights gained under confirmatory patents was to be determined by state law. Presentation of the public trust for confirmation thus would not have been within the jurisdiction of the Board. The Court stated:

> ". . . [T]he government provided for discharging the obligation of protection cast upon it by the stipulations of the treaty [of Guadalupe Hidalgo], and at the same time for separating private lands from the public domain. By proceedings under that act [of March 3, 1851], imperfect rights — mere equitable claims — might be converted by the decrees of the board [of Land Commissioners] or courts, and the patent of the government following, into legal titles; but whether the legal title thus secured to the patentee was to be held by him charged with any trust, was not a matter upon which either board or court was called upon to pass. If the claim was held subject to any trust, before presentation to the board, the trust was not discharged by

the confirmation and the subsequent patent. . . ." (72 U.S. (5 Wall.) at 335.)

From this it is seen that the Board of Land Commissioners did not have the jurisdiction to consider the existence of the public trust on tidelands within ranchos, and thus, contrary to petitioner's contention, the failure to present the public trust for confirmation could not have served to extinguish it.

Not only did *Townsend* articulate the Board's limited jurisdiction, dealing a fatal blow to petitioner's argument, it went further, ruling that the Treaty of Guadalupe Hidalgo did not purport to alter the character of the interests a party may have held under the former government, and that the Act of 1851 did not change the nature of estates in such land. (72 U.S. (5 Wall.) at 334, 335.) Applied to the instant case, *Fremont* and *Townsend* hold that petitioner's property, being subject to the public trust before presentation to the Board, was still held subject to the trust after the confirmation and the subsequent patent even though it was not presented for confirmation. (72 U.S. (5 Wall.) at 334, 335; 58 U.S. at 564.)

Indeed, this Court has held that even *rejection* of a public rights claim by a confirmatory board could not extinguish such rights. Such was this Court's conclusion in *New Orleans v. United States* (1836) 35 U.S. (10 Pet.) 662, where the Court held that if a public trust exists on property while under a former sovereign, upon cession the land impressed with the public trust does not pass as ordinary property which would then be public land of the United States and freely alienable. Rather, the Court observed that the property could not be sold because title to the property was vested in the United States as successor sovereign, and, since the property had been dedicated to public use by the prior sovereign, the United States acquired no right to dis-

pose of it in the manner of other public lands. Moreover, the Court noted that the right to regulate this use, and to carry out the trust, belonged to the State, such a right never having been delegated to the federal government. (35 U.S. (10 Pet.) at 736-737; accord, *City of Monterey v. Jacks* (1903) 139 Cal. 542, 73 P. 436; *Richert v. City of San Diego* (1930) 109 Cal.App. 548, 293 P. 673.) Significantly, the public rights recognized in *New Orleans* earlier had been presented to a confirmatory board, identical in purpose to California's Board of Land Commissioners, and had been rejected, and this Court still found that the public trust had not been extinguished. (35 U.S. (10 Pet.) at 733-738.)

Again in *Eldridge v. Trezevant* (1896) 160 U.S. 452, the Court recognized that a public servitude created under the rule of a prior sovereign survives the transfer of sovereignty and the confirmatory proceedings. In *Eldridge*, the public servitude involved gave the State of Louisiana the authority to construct levees across riparian property, without compensation to the landowner, where necessary to confine river waters and protect the inhabitants against inundation. The highest state court had permitted such a taking on the ground that, under French and Spanish laws existing before the State's transfer to the United States, lands abutting waterways were subject to a servitude in favor of the public. It was this servitude, now held by the State, that had been validly exercised, the court ruled. This Court affirmed. Upholding the servitude, the Court determined that the provisions of the Fourteenth Amendment to the Constitution do not override public rights existing in the form of servitudes or easements which are held by the courts of a State to be valid under its Constitution and laws. (160 U.S. at 462-466.)

The reasoning in these cases is particularly applicable to the instant case. The public trust existed under Mexican

sovereignty and was not extinguished under the Act of 1851, the combined teaching of *New Orleans* and *Eldridge* being that confirmatory proceedings are irrelevant to such an interest and that such interests, having survived, may be recognized and redefined by state law.

Thus, as in *New Orleans*, petitioner's attempt to use the confirmatory proceedings as a bar to the existence of the public trust must fail. Indeed, as in *Eldridge*, petitioner's attempt to challenge public rights held by the courts of a state to be valid under its Constitution and its laws must fail.

In view of these rulings upholding the continued existence of public rights arising under prior sovereigns, petitioner's reliance on *Barker v. Harvey* (1901) 181 U.S. 481 (Pet., pp. 14-15), is inapposite. That case concerned the claim of a band of Mission Indians, a claim held by this Court to constitute a private property claim, not one of public rights as here. Since the 1851 Act "to ascertain and settle private land claims" required presentation of all *private* claims, the Indians were duty-bound to present their claims to the Board of Land Commissioners. They did not, and this, it was held, constituted an abandonment. (181 U.S. at 489-491.)

Furthermore, the Act of 1851 specifically required the Board to investigate the right and title of Mission Indians. (9 Stat. 631 § 16; App. B-2, p. A-113.) None having been reported with respect to these particular Indians, the Court in *Barker* concluded that they had no claim. (181 U.S. at 492-493.) This was confirmed in *Cramer v. United States* (1923) 261 U.S. 219, when in the course of rejecting *Barker*, the Court observed that the Mission Indians in *Barker* had abandoned their claim prior to cession and this abandonment had been recognized by the Mexican authorities. (261 U.S. at 231-232.)

Thus *Barker v. Harvey* has no applicability here. It deals with Indians whose claims were amply provided for under the 1851 Act, and who, as a matter of fact, had no valid claim. It cannot be applied to public rights not encompassed within the Act.[11] As to public rights there can be no abandonment. (*Eldridge v. Trezevant* (1896) 160 U.S. 452; *New Orleans v. United States* (1836) 35 U.S. (10 Pet.) 662.)

IV.

The Fact That Ballona Lagoon Is an Arm of the Sea Is Not a Collateral Attack on Petitioner's Patent.

The state court's determination that Ballona Lagoon, an arm of the sea today, has been a tidal body of water for over 900 years presents no federal question nor is it a collateral attack on the patent issued to petitioner's predecessors. Indeed, its existence is shown on the plat of the rancho which the United States General Land Office certified as true and accurate, on the survey field notes approved by the General Land Office, both of which are contained in the patent (App. C-1, p. A-117), and is verified by its depiction on federal surveys conducted over 100 years ago. (R.T. 245-249; Exhs. 13-15.)

At trial, the court received testimony from experts in the fields of geology and geomorphology that Ballona Lagoon has existed at its present location since its formation at the end of the Ice Age. The experts based their conclusions on United States Coast and Geodetic surveys of the area conducted in 1876, 1887, and 1896 which proved Ballona Lagoon to have been an arm of the sea at the time petitioner states it did not exist, as well as historical photographs of the lagoon, and geological age dating experiments con-

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[11]Nor can petitioner find comfort in *United States v. Title Insurance Co.* (1924) 265 U.S. 472, which also concerned the duty of Indians to present their private land claims to the Board under the 1851 Act.

ducted on core samples taken from the subsurface of Ballona Lagoon, which results confirm the lagoon's 900-year existence. (R.T. 197, 208-209, 223-224, 236-258, 346-361, 389-390, 724-751; Exhs. 13-16, 24-34, 69-74.)

It should be noted that at trial petitioner never challenged the evidence respecting the historic existence of the lagoon and specifically did not object to the introduction of the testimony of the geologist or the geomorphologist or their supporting exhibits on the grounds herein raised.

Petitioner now alleges that this evidence constitutes a collateral attack on the patent. (Pet., pp. 15-18.) But petitioner does not call this Court's attention to the fact that the property description contained in petitioner's patent makes repeated references to the existence of an arm of the sea or "inner bay" within its boundaries (App. C-1, pp. A-117 - A-119), and that the map drawn from this legal description, also incorporated into the patent, clearly shows the presence of this extensive "inner bay." (App. C-1, p. A-122; App. C-2, p. A-124.)

Thus the final record of the property confirmed to petitioner's predecessors on its face describes a parcel of property containing an arm of the sea; that is, a body of water connected to the sea by an inlet and labeled an "inner bay." (App. C-1; App. C-2.)

Petitioner alleges that this arm of the sea does not exist. Petitioner points to an 1873 intermediate decision in the General Land Office made by Commissioner Drummond for its contention that what was surveyed by the United

States as a fully developed coastal lagoon system in 1876 did not exist just three years earlier.[12] (Pet., p. 16.)

While this makes no sense in geologic terms, it does point up a latent ambiguity. For if one accepts as a final decision Commissioner Drummond's intermediate determination that there was no arm of the sea in the rancho, it creates an ambiguity when read together with the patent, which not

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[12]Contrary to petitioner's characterization of the events at the General Land Office (Pet., p. 16), the survey of Rancho La Ballona was before the Land Office because the grantees of Rancho San Vicente y Santa Monica, the rancho abutting Rancho La Ballona on the north, filed an objection to the La Ballona survey asserting that its northern boundary encroached into their rancho. The basis for this objection was that Hancock, the surveyor, had selected the wrong natural monuments as the northeast and northwest corners of the rancho. (App. D-2, p. A-130.)

Commissioner Drummond determined that the La Ballona survey was correct and decided that the "inner bay" described in the field notes and drawn on the survey plat was not an arm of the sea; yet in absolute contradiction, he also found that the mouth of this "inner bay" emptied into the ocean. (App. D-2, pp. A-136, A-137.)

This decision was appealed by the Rancho San Vicente y Santa Monica grantees to the Secretary of the Interior. Significantly, petitioner does not refer this Court to the decision of Secretary of Interior Delano, issued on November 17, 1873, which *superseded* that of Commissioner Drummond. (*New Orleans v. Paine* (1893) 147 U.S. 261, 266; *Knight v. United States Land Association* (1891) 142 U.S. 161, 177-179.) In that decision Secretary Delano held:

> "[The decree of confirmation for Rancho La Ballona] establishes the boundary in question from point to point by reference to natural monuments and I am satisfied that these monuments are correctly located by the Hancock survey.
>
> "I therefore affirm your decision and return herewith the papers transmitted with your letter of August 12, 1873." (Exh. R.)

It is clear that Secretary Delano was only interested in the placement of the rancho's northern boundary and not in the character of the lands within the rancho or its "inner bay." However, by accepting the Hancock survey as correct, Secretary Delano also accepted the inner bay's existence within the rancho, since its description is as much a part of the survey as the description of the rancho's perimeter.

The confirmatory patent for Rancho La Ballona was then issued. The patent specifically included the description prepared by Hancock which contains repeated references to the "inner bay," as well as the survey plat which depicts it. (Exh. T; App. C-1, p. A-118 - A-119, A-122; App. C-2, p. A-124.)

only describes, but clearly depicts an "inner bay" within the rancho.[13]

Because of this ambiguity, evidence of exactly what was confirmed to petitioner's predecessors was properly admitted, not to challenge the validity of the patent or its boundaries, for a federally confirmed Mexican land grant could embrace tidelands, but only to explain what had been granted. (*Broome v. Lantz* (1930) 211 Cal. 142, 151, 294 P. 709, 713; *Ferris v. Coover* (1858) 10 Cal. 589, 625-626.)

Indeed, the receipt and consideration of evidence for such an explanation of a patent description was specifically approved by this Court in *Stewart v. United States* (1942) 316 U.S. 354, in the following language:

> "[T]o explain the meaning and extent of a decree is not to attack it for error, but to reconcile all of the descriptive language used to designate the tract title to which is confirmed.
>
> "We are of the opinion that the evidence in question was of probative value [and] that its reception and consideration did not run counter to the rule that the decree of confirmation was not open to attack by reason of erroneous description of the land confirmed. . . ." (316 U.S. at 363.)

Thus the evidence of the historical existence of Ballona Lagoon serves only to reconcile the ambiguity between Commissioner Drummond's decision and the La Ballona

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[13]That what the survey and patent termed an "inner bay" in 1858 and 1873 respectively was indeed an arm of the sea is not subject to doubt; a bay is by definition an arm of the sea. Petitioner questions the California Supreme Court's use of a 1951 dictionary definition for this determination (Pet., p. 17, n. 20), but the definition of "bay" has remained unchanged in the last 150 years. In 1832, Noah Webster wrote, "bay . . . a recess or *arm of the sea*." (Webster, A Dictionary of the English Language (1832) p. 47; emphasis added.)

patent. Taken alone, the patent requires no explanation; it unambiguously describes and depicts an "inner bay," a portion of which is the Ballona Lagoon of today. Furthermore, the fact of the lagoon's existence could not constitute a collateral attack on petitioner's patent. The lagoon exists. It is a part of the land that petitioner owns, and the quality of its title is no different from that conveyed by Mexico and confirmed by the United States.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: December 21, 1982

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 30 1983

No. 82-708

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

CITY OF LOS ANGELES OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

The court below, the California Supreme Court, was presented with the issue of whether title to a parcel of land, derived from a Mexican land grant, was subject to an easement of "commerce, navigation and fishing" ("public trust easement"). The parcel is water covered, subject to the tides of the Pacific Ocean, and covered with sea water at both low tide and high tide. The California Supreme Court has in several recent cases held that water-covered lands are subject to a "trust interest" notwithstanding that title to such land is in private ownership.

The court held that Mexican rancho land was subject to the same public trust easement interest as were other similar lands. Respondent, City of Los Angeles, therefore, does not agree with petitioner's descriptions of the questions presented to this court.

In our view they are:

1. Is a federal question presented by a determination that lands derived from a Mexican land grant are subject to the same public trust easement as other similiar lands in the State of California? Petitioner asserts that federal jurisdiction arises under the Treaty of Guadalupe Hildago (9 Stat. 922) (1848) and the "Act of 1851" (9 Stat. 631).

2. If a federal question is presented, did the patent to such land under the "Act of 1851" terminate all public rights and easements in such land which existed when it was under Mexican sovereignty?

3. Is a statement of fact in a Land Commissioner opinion "res judicata" as to the character of the patented lands, or, as respondents contend, is determination of the character of the land beyond the commissioners' jurisdiction and of no effect?

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Respondent, City of Los Angeles respectfully submits that a writ of certiorari is not appropriate in this case. The reasons therefore are explained hereafter.

OPINIONS BELOW

The petitioner has accurately set forth the opinions of the California Court of Appeal and the California Supreme Court and has reproduced those opinions in the appendix to its petition.

JURISDICTION

While respondent does not agree that this is a matter properly within this court's jurisdiction, it has no quarrel with the manner in which the jurisdictional claim is made.

STATUTE INVOLVED

Petitioner has designated and set forth in its appendix the appropriate federal statutes involved in this case.

STATEMENT OF CASE

A. Facts.

The facts of this case are appropriately stated in various portions of the opinion of the California Supreme Court in City of Los Angeles v. Venice Peninsula Properties, et al. (1982) 31 Cal. 3d 288, 182 Cal. Rptr. 599, 66 P. 2d 92, reproduced in page A-1 - A-32 of

the appendix to the petition.[1/]

"In the present case, the issue is whether the public trust doctrine applies to tidelands in which the state and federal government never had fee title. The tidelands involved here were originally acquired by private persons from the Mexican government prior to the time California was ceded to the United States under the Treaty of Guadalupe Hidalgo, and later patented to the owners by the federal government in accordance with requirements of the treaty." (p. A-2.)

"In 1839, while California was a part of Mexico, the Constitutional Governor of California granted to

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1/ References herein will be made to the appendix to the petitioner's petition of writ of certiorari and to various pages thereof. We will also throughout this opposition refer to other portions of said appendix.

Augustin and Ignacio Machado and Filipe and Tomas Talamantes a property known as Rancho Ballona. The rancho's western border was the Pacific Ocean and it included Lots C and R. [These are lots contained in a subdivision made in 1905 of a portion of the rancho.] . . . .

* * *

"The Machados and Talamantes, following the procedure set forth in the act [Act of 1851], petitioned the Board of Land Commissioners in 1852 for a decree confirming their title to the rancho. After a hearing the board confirmed the title, describing the boundaries of the rancho in the same terms as the original Mexican grant. That decision was affirmed by the United States District Court in 1855.

"However, before a patent could issue, a survey of the property was required, approved by the Surveyor General of California. (9 Stat. 633, §

13.) In 1858, Henry Hancock conducted a survey and prepared a plat which showed a large body of water labeled 'inner bay' extending from the southwest corner of the property parallel to the Pacific Ocean in a northwesterly direction. Hancock's field notes set forth his measurements as he walked along the shores of the bay, crossed an inlet, and came to the Pacific Ocean." (pp. A-4 - A-5.)

"In 1869, objections to the survey were filed by the owners of the ranch which bordered Rancho Ballona on the north, an area some distance from that marked 'inner bay' on the Hancock survey. Under a statute passed in 1864 to expedite the settlement of land titles in California (13 Stat. 332) the Hancock survey was forwarded to Washington to the General Land Office Commissioner, who was required to approve it prior to the issuance of the

patent, and to settle conflicting claims to the land surveyed. Commissioner Willis Drummond decided that the survey was accurate with regard to the disputed northern boundary. He determined also that the 'inner bay' shown on Hancock's map was not an arm of the sea, basing this determination in part on three affidavits which stated that the area labeled 'inner bay' on the plat was dry land used for pasturage, except at times of overflow at high water and during storms, when sand blocked the mouth of the creek which, on Hancock's plat, emptied into the 'inner bay'. However, Drummond approved the Hancock survey." (pp. A-5 - A-6.)

"Ballona Lagoon, the subject of this proceeding, is an arm of the Pacific Ocean in the Marina del Rey area of Los Angeles. It is subject to the tides, and inundated with seawater at mean low tide and mean high tide. At

mean high tide, the depth of the water is sufficient to be navigable by shallow draft vehicles [vessels]. At its northern end, the lagoon is connected to the Venice Canals, and provides the sole source of water for them. (p. A-2.)

"In 1905, the shore surrounding the lagoon was subdivided into three large abutting tracts, and some of the tidelands were filled and improved. The present case involves two of those tracts, Lot R of the Silver Strand subdivision and a portion of Lot C of the Del Rey subdivision, both of which consist entirely of waterways. . . . In recent years, motor-controlled tide gates were installed between the Pacific Ocean and the entrance to the lagoon to control the ebb and flow of the tide within the lagoon; they are used to prevent flooding of the adjacent land." (p. A-2.)

B. **Proceedings Below.**

We believe the California Supreme Court has also concisely and accurately described the nature of the proceedings involved herein, the parties, and the trial court judgment. We therefore quote from the decision as follows:

"The City of Los Angeles desired to dredge the lagoon, construct sea walls, and make other improvements therein without exercising its power of eminent domain. It filed an action for declaratory relief and to quite title in the lagoon against the owners of lots C and R, and the holder of an easement in these lots (hereinafter called defendants). The complaint alleged that the public owns an easement in the lagoon for commerce, navigation and fishing, for the passage of fresh water to the Venice Canals, and for water recreation. It alleged also that the

lots had been dedicated by their owners for public use. The city joined the State of California as a defendant in the action, as contemplated by section 6308 of the Public Resources Code. The state thereafter filed a cross-complaint, alleging that it had acquired an interest in the tidelands of the lagoon for commerce, navigation and fishing upon admission to the Union, that it held this interest in trust on behalf of the public, and had granted its interest to the city. (For literary convenience, the city and the state will be referred to collectively as plaintiffs.)" (pp. A-2 - A-3.)

"After a trial at which both documentary and testimonial evidence was received, the trial court determined that the state holds in trust for the people the easements claimed in the city's complaint, and that the state or its successors have the right to

construct the improvements in the lagoon without exercising the power of eminent domain. The court found also that defendants had dedicated the property as public streets or waterways." (p. A-4.)

C. Mexican Law.

At page 13, petitioner in its footnote 13 implies that the California Supreme Court was in error in determining that tidelands were inalienable under Mexican law, citing a decision involving Spanish law and its application within the Phillipine Islands. (Jover y Costas v. Phillipine Islands (1911) 221 U. S. 623.) Under California law the existence of foreign law and its meaning is a question of fact, but subject to judicial notice by the trial court if it chooses to take

such notice. 2/ In the case at bar, the trial court required testimony on the law of Mexico. The findings of the trial court are summarized in the following quotation from the California Supreme Court opinion.

"The law of Mexico at the time of cession declared that the public had a right to use of the tidelands; this right was similar to the common law public trust. In the grant of Rancho Ballona to the Machados and Talamantes, it was provided that the grantee 'may

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2/ California Evidence Code Section 452 provides, in part: "Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: . . . (f) The law of an organization of nations and of foreign nations and public entities in foreign nations." Rule 44.1 of the Federal Rules of Civil Procedure also provides for "judicial notice" permitting the court to "consider any relevant material or source, including testimony." However, under Rule 44.1, the determination of foreign law is a question of law.

enclose it without predjudice to the traversing roads and servitudes.' An expert on the law of Mexico who testified on behalf of defendants [petitioner herein] stated that the purpose of this language was to preserve 'the rights of the public. . . [omission by court] in the conveyance of large tracts of land by the authorites.' Thus, when California was ceded by Mexico, the title of defendants' predecessors was subject to the interests of the public in the tidelands included in the grant." (pp. A-8 - A-9.)

We submit that the trial court and the California Supreme Court have correctly determined the applicable Mexican law. The decision in Jover is not applicable to the case at bar. Jover concerned a grant by the Phillipine governor of tidelands, and only tidelands, with an express provision that such tidelands be

reclaimed, not reserving public rights as in this grant. A substantial portion of the granted tidelands had been reclaimed while the Phillipine Islands were a possession of Spain. This is not comparable to a grant of a large tract of land of which only a portion were tidelands, and which were not reclaimed.

Thus, the decision of the trial court and of the California Supreme Court did not result in any diminution of the private rights of the Mexican grantees or their successors from those which they had when Ballona Rancho was under the sovereignty of Mexico.

D. Applicability of Decision.

The California Supreme Court decision applies only to water covered land. At pages 10 through 12 of its brief, petitioner implies that filled and/or reclaimed lands are affected by the decision. However, the impact of

the California Supreme Court opinion is only to establish that tidelands (sloughs, creeks and shallow pools) shall be treated the same throughout California, whether located in Mexican land grant properties or in other properties. The California Supreme Court expressly declined to make its opinion applicable to any properties other than those in issue and similar properties. It stated in footnote 15: "Our opinion is not to be understood as deciding matters which are raised by the parties but are not necessary to the determination of the issue before us. For example, although the state alleged in its cross-complaint that portions of the Ballona Lagoon which have been filled are still subject to the public trust, that issue is not involved in the present proceeding, since the property here consists entirely of tidelands." (p. A-16.)

If assertions are made in the future that filled and/or reclaimed lands are subject to the trust, the nature of the public's rights in such lands, if any, is an issue for subsequent litigations.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. Summary of Argument.

Petitioner asserts the decision of the Supreme Court of the State of California is "unprecedented." It is subject to being so described only because it is the first time there has been a litigation in which a tidelands easement has been claimed in property patented under the Act of 1851. Otherwise, it is fully in accord with established precedent.

As the California Supreme Court states (p A-1), in California a trust interest exists in tidelands and in lands between high and low water in

nontidal waters. This Court has also found that such interest exists in water covered land where title is derived from a royal patent from the King of England. (Lewis Blue Point Oyster Cultivation Company v. Briggs (1913) 229 U. S. 82.) It has found that such interest exists, and cannot be abdicated, in waters of Lake Michigan which had been conveyed by the Illinois legislature. (Illinois Central Railroad Company v. Illinois (1892) 146 U. S. 387.) It would appear that lands derived from a Mexican land grant should be treated no differently than lands generally.

The writ which petitioner seeks should not be granted for the following reasons:

1. The cases discussing the effect of a patent under the Act of 1851 were not concerned with the existence or non-existence of easements. Most of the

cases cited dealt with who or what entity held title to lands which were subject to the tides, but which had been reclaimed and were no longer suitable for tidelands purposes except United States v. Coronado Beach Company (1921) 255 U.S. 472 (see infra p. 20). The issues were which of the parties had the right to make a general use of the properties involved, not whether such uses were restricted to commerce, navigation and fishing.

2. This Court has squarely held that the Act of 1851 had no application to the existence or nonexistence of easements. The determination of whether or not land is encumbered with easements is not a federal question.

3. This Court has squarely held that granted tidelands, including those derived from grant or patent from a previous sovereign, could be and were

subject to the sovereign navigation easement.

4. The jurisdiction conferred upon the General Land Office was to determine boundaries of the granted land. This is all that was at issue when Commissioner Drummond made his report of April 30, 1873. The recitations in the Drummond report are contradictory to the conclusion in the report, but regardless of their nature, were surplusage to the issue presented and the limited jurisdiction of the office.

B. The Cases cited by Petitioner involve Title.

It is true, as petitioner asserts, that "this Court has consistently held that tidelands contained within prior Mexican grants did not pass to California on its admission to the Union." These rulings, however concerned title - not subsidiary

interests in land. While each case contains language describing the effect of the grant as having the effect of a "quitclaim," the cases did not involve public rights in the granted lands. The cases determined which of two parties had a right to make a "non-sovereign" use of the land.

The cases cited by petitioner do not involve any claims of easements, sovereign or otherwise, in tidelands.

United States v. Coronado Beach Company (1921) 255 U. S. 472 was a condemnation case. The United States claimed it should not have been required to pay compensation when it sought to acquire title in certain submerged lands. The district court and this Court disagreed. It held title had been established in the confirmation proceedings, stating at pages 487-488: "The questions whether there was such a prior grant, and what were its

boundaries, were questions that had to be decided in the proceedings for confirmation, and there was jurisdiction to decide them as well if the decision was wrong as if it was right." [Emphasis added] The case says nothing about whether the title in such submerged lands is subject to encumbrances or restrictions. 3/

Knight v. United Land Association (1891) 142 U. S. 161 involved two parties claiming title to lands which were once, but were then no longer, below the line of ordinary high

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3/ The United States may use tidelands for navigation purposes and take over exclusive possession of them without payment of compensation under its navigation servitude. But if the United States choses to condemn the fee it must pay just compensation. (United States v. 11.48 acres (5th C, 1954) 212 F.2d 853, 855; United States v. 93.97 acres (7th C, 1958) 258 F. 2d 17, 26.)

water. Thomas Knight, the defendant, claimed a right to use the land for private purposes based on conveyances from the Mexican land grantee, the City of San Francisco. United Land Association claimed from the State's Tidelands Commissioner. Neither party claimed the right to utilize property for tidelands purposes or claimed that the land was subject to a tidelands restriction.[4]/

4/ This fact was expressly recognized In Crystal Springs L. & W. Co. v. City of Los Angeles (1897) 82 F. 114, 119, affirmed 177 U. S. 169. The district court said "Knight v. Association, 142 U. S. 161-216, . . . was also clearly a suit of federal cognizance, because the contest was between titles derived, one through a grant from the State of California, and the other through a patent issued by the government of the United States . . . ." In the view of the district court, a water rights dispute in patented land (under the Act of 1851) did not present a question under either the Treaty of Guadalupe Hidalgo or the Act of 1851. (See infra, p.28.)

San Francisco v. Le Roy (1891) 138 U. S. 656 was a quiet title action where the plaintiff claimed title from both the City and the State Tideland Commissioner to land which was no longer subject to tides nor useful for tidelands purposes.

The same is true in Beard v. Federy (1866) 70 U. S. 478. There Mr. Beard, who had never had his title confirmed by the Lands Commission, asserted that the confirmed title was invalid because of being improperly issued by the Mexican governor. Again, two private persons were contesting the ownership of land to be used for private purposes. None of the cases involved a claim to the soverign easement or right of commerce, navigation and fishing.

All of the cited cases must be read and construed in the light of the issues presented, which were never the right of the public to use tidelands.

Such caution is contained in the very important navigation case of Illinois Central Railroad Co. v. Illinois (1892) 146 U. S. 387, 453, where this court stated:

> "General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases."

Contrary to petitioner's assertion, the cited cases are not "controlling precedent." At most, they contain dictum read out of context.

C. This Court has Repeatedly Stated that the Existence or Non-Existence of Easements in Property Derived from a Mexican Land Grant is not a Federal Question.

The Act of 1851 conferred only limited jurisdiction in Mexican land grant matters. Jurisdiction was (1) "to

decide upon the validity of the said claim" (§8, pp. A-109 - A-110), and (2) "to cause all private claims which shall be finally confirmed to be accurately surveyed." (§13, p. A-112) No additional matters were to be decided, and in all other respects the patented land was to be treated as land generally.

The single most important authority on such limitation is this Court's 1855 decision that it would not involve itself in the question of the existence of servitudes in lands granted by the Spanish or Mexican governments in California; nor in whether such servitudes survived the confirmation process. This case was Fremont v. United States (1855) 58 U. S. (17 How.) 542. The District Court had held that Colonel Fremont was not entitled to confirmation of his claim under a Mexican grant because the land contained

gold and silver. Under Spanish and Mexican law precious minerals were not subject to private ownership. Of this argument this Court said at page 565:

> "In relation to that part of the argument which disputes his right, upon the ground that his grant embraces mines of gold or silver, it is sufficient to say, that under the mining laws of Spain, the discovery of a mine of gold or silver did not destroy the title of the individual to the land granted. The only question before the court is the validity of the title. And whether there be any mines on this land, and if there be any, what are the rights of sovereignity in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court by the Act of 1851." [Emphasis added.]

This ruling has been followed in subsequent decisions of this Court in which a party sought to have the federal courts determine the existence or nonexistence of easements in lands

patented under the Act of 1851. It was so well settled that federal jurisdiction did not exist that this Court summarily affirmed the dismissal of a suit commenced in the United States District Court seeking to litigate the existence or nonexistence of a servitude. (Crystal Spring L. & W. Co. v. City of Los Angeles (S.D., Calif., 1897) 82 F. 114; affirmed in Crystal Springs L. & W. Co. v. City of Los Angeles (1900) 177 U.S. 169.) In that case, the District Court said in dismissing the complaint (p. 117):

> "Where the parties claim under Spanish or Mexican grants, confirmed and patented by the United States, and the controversy is only as to what were the rights acquired by the parties respectively, or their predecessors in interest, under the Spanish or Mexican governments, it being conceded that the rights so acquired, whatever they may have been, were included in the confirmation and quitclaimed through the patent of the

United States, federal jurisdiction does not exist; and it is immaterial whether such rights were acquired through the original grants or transactions subsequent thereto." [Emphasis added.]

See also Devine v. City of Los Angeles (1906) 202 U.S. 313, 337.

Petitioner asserts that the "Equal Footing Doctrine" 5/ does not apply to this case. That doctrine properly refers to "political rights and to sovereignty." (United States v. Texas (1950) 339 U. S. 707.) To the extent it deals with property rights in navigable waters, it applies only to the shores and "the soils under them." (Ibid.)

5/ This term has not been utilized in this litigation until the petition for writ of certiorari. Respondent has not sought to rely upon such doctrine. Petitioner has sought to thrust upon respondent a theory that is inapplicable and which respondent has not used.

D. The Rights Obtained by a Private Grantee in Navigable Waters are Subject to the Sovereign Easement of Commerce, Navigation and Fishing.

Petitioner's basic theory is that the confirmation of the patent under the Act of 1851, without reservation of public easements or rights, conclusively establishes their non-existence. Petitioner so argued to the courts below. The California Supreme Court held that the confirmation did not destroy the public trust easement.

The California Supreme Court, at this time or at the time patent confirmations were being litigated, could not have held otherwise. If it had done so, the public roadways connecting the ranchos and the urban areas of the state would have legally ceased to exist. This did not occur, and both communication and

transportation continued to exist in California. It would not be rational to preserve land highways and not similarly treat the waterways which were, and are, a major highway of commerce.[6/] The highway easements which survived the patent under the Act of 1851 are every bit as broad as the public trust easement, permitting, under California Law, nearly every pub'ic use. (Mancino v. Santa Clara, etc. Flood Control District (1969) 272 Cal. App. 2d 678, 77 Cal. Rptr. 679.)

It is unlikely that any litigation will arise at this time questioning the existence or non-existence of a highway easement which

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6/ This court has indicated that road easements survived the patent. (Barker v. Harvey (1901) 181 U. S. 481, 499.) Such rulings are rare, however, because this court generally held that existence of servitudes did not present a federal question.

may have existed prior to 1848. 134 years have gone by, and long continued public use will have conclusively established the existence of such highway. Similarly, the public has been making navigation uses of the waters which are the subject of this litigation; the trial court ruled that there has been an implied (or prescriptive) dedication of easements for use as waterways. (pp. A-16 and A-32.)

Whenever the need or opportunity to do so has occurred, this Court has held that the navigation easements survived a grant of submerged lands.

A most important example of this ruling is Illinois Central R. Company v. State of Illinois (1892) 146 U. S. 387. This Court affirmed a ruling that a grant by the Illinois legislature of the submerged lands of Lake Michigan

adjacent to the City of Chicago was invalid insofar as it purported to grant the fee of such lands for purposes other than the futherance of navigation and commerce.[7/] The Court pointed out that the state's title in tidelands is different from that held by the state in lands it intends to sell. "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private

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7/ This Court's consideration of the Illinois Central case does not conflict with our argument that the quality of title and/or restrictions upon title do not involve a question of federal law. Illinois Central was considered by the United States District Court on the theory that the repeal of legislation granting such land presented a question relating to impairment of the obligation of contract or deprival of property without due process of law. (State of Illinois v. Illinois Central R. Company (N.D. Ill., 1883) 16 F. 881.)

parties." (P. 452.) Of such title, this Court said: "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . .than it can abdicate its police powers in the administration of government and the preservation of the peace." (p. 453.) And the Court concluded at page 455 that an act of the Legislature conveying such lands "would be repudiated without hesitation, as a gross perversion of the trust over the property under which it is held."

With respect to grants made by previous sovereigns, the case of Lewis Blue Point Oyster Cultivation Company v. Briggs (1913) 229 U. S. 82 appears much in point. Plaintiff's title derived from a grant made to a portion of the bed of the Hudson River when New York was a part of Great Britain. The

defendant was a contractor of the United States employed to dredge a channel in the river. The dredging would destroy a plaintiff's oyster bed.

This Court held that plaintiff was not entitled to an injunction to restrain the dredging, stating as pages 87 and 88:

> "That case and the later one cited fail to recognize the qualified nature of the title which a private owner may have in the lands lying under navigable waters. If the public right of navigation is the dominant right, and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation. This right to control, improve, and regulate the navigation of such waters is one of the greatest of the powers delegated to the United States by the power to regulate commerce. . . .
> "By necessary implication from the dominant right of navigation, title to such submerged land is acquired and

> held subject to the power of Congress to deepen the water over such lands, or to use them for any structure which the interest of navigation, in its judgment, may require."

This policy was more recently reiterated in Montana v. United States (1981) 450 U. S. 544, 552, where the Court said that there is a presumption against conveyance of the bed of a navigable water and a court "must not infer such a conveyance;" that "the mere fact the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, ..." (ibid at p. 554); and, finally, this Court explained that all parties agreed that a navigational easement was owned by the United States "regardless of who owns the riverbed." (Ibid at p. 555.)

Petitioner, at pages 13 and 14, asserts that the State had to present its claim during the confirmatory

process under the Act of 1851. It bases its argument on this Court's decisions in Barker v. Harvey (1901) 181 U. S. 481 (supra) and United States v. Title Insurance Company (1924) 265 U. S. 472. Those were cases in which the court held that tribes of Indians had lost their right to occupancy of patented lands, if they ever had such right, by failing to present the claim. A positive holding that servitudes survive the patent process, even though not claimed by the dominant owner under the Act of 1851, is in Devine v. City of Los Angeles (1906) 202 U. S. 313, 316 where this Court recited, but rejected the argument:

> "And the bill further averred that the construction of the act of Congress of March 3, 1851, upon which the defendant city rested its right and claim to said river and to said waters, is erroneous, and. . . the city was required to present to the board of land commissioners its claim to the waters of the river for confirmation."

In the Devine case, at page 337, this Court said questions as to "nature and extent of. . .title. . .are not Federal questions but questions of State or general law." It also affirmed that a person or entity claiming an easement in granted land need not file a claim. This was in accord with Fremont v. United States (1855) 58 U. S. (17 How.) 542 (supra) where the court stated: "The only question before the court is the validity of the title."

It therefore is established that the public rights in navigable waters will survive a Mexican land patent, and that the easement rights did not have to be claimed in the confirmation proceeding.

E. Commissioner Drummond's Comment Regarding the Character of the "Inner Bay" was Superfluous to the Determination of the Boundaries of

Rancho Ballona and, Considering all the Circumstances, was Ambigious.

The Act of 1851 clearly established and limited the jurisdiction of the Land Commissioners. Their jurisdiction and duty was "to decide upon the validity of the said claim." (pp. A-109 - A-110.) Thereafter, it was the duty of the Surveyor-General of California "to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same." (p. A-112.) Thereafter, a patent issued to the claimant upon presentation of a certificate of confirmation and a certified plat or survey. (p. A-112.) It is clear that the validity of the title and the location of the boundaries were all that was decided in the confirmation proceedings.

None of the cases cited by petitioner at page 17 of its petition

are to the contrary; in fact, they support the determination of the California Supreme Court. For example, in Borax Consolidated Ltd. v. City of Los Angeles (1935) 296 U. S.10, 17 this Court said of the rule relating to finality of General Land Office decisions: "But this rule proceeds upon the assumption that the matter determined is within the jurisdiction of the Land Department," and continued and pointed out that the jurisdiction of the department is a matter for judicial determination. (p. 18.)

Each of the other cases also involved title. None of them involved the rights of the public in such land. Further, Burke v. Southern Pac. R. Company (1914) 234 U. S. 669, 710 expressly recognized the right of the government to sue to annul a patent issued without authority. A similar qualification was contained in Johnson

v. Drew (1898) 171 U. S. 93, 100.

A determination of whether or not the so called "inner bay" was an arm of the sea, covered by water, or pasture land was entirely outside of the jurisdiction of the Board of Land Commissioners and the Surveyor-General. It was also, in context, merely a comment on the evidence. The character of that area was not determinative of the disputed boundaries of the rancho. This Court has held that non-essential determinations--determinations which do not substantially affect the rights of the parties--do not have a res judicata or collateral estoppel effect, stating in Norton v. Larney (1924) 266 U. S. 511, 517: "The principle of res judicata does not apply to points which come under consideration only collaterally or incidentially." To the same effect, see Lynne Carol Fashions Inc. v. Cranston Etc. Co. (3d C 1972) 453 F.2d 1177, 1183

where the court said: "The requirement that the issue to be barred must have been necessary to the decision in the first litigation is well entrenched in the law. The sound basis for the principle is that parties should be estopped only on issues they actually deem important, and not on incidental matters."[8/]

Petitioner claims at page 11 of its brief that this case "does affect the hundreds of sloughs, creeks and shallow pools lying inland from the shoreline, often separated from the oceans by a barrier beach, sand spit or other land mass." The fact that such "wetland areas" were commonly included

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8/ It should be noted that this limitation applies to courts of general jurisdiction. Where the jurisdiction is limited, as with the Surveyor-General, even essential findings beyond the limited jurisdiction should not have a res judicata effect.

in Mexican grants, and commonly included within the confirmed boundaries, certainly establishes that their existence was not a matter of great concern to the Surveyor-General.

The California Supreme Court also points out the ambiguity of the Surveyor-General's decision. On one hand he said it was not "an arm of the sea." On the other hand he approved the Hancock survey and his field notes which showed the existence of the "inner bay". (p. A-6.) An additional ambiguity exists because Commissioner Drummond's determination did not negate that the inner bay was water covered. In fact the depositions of Tomas Talamantes, Jose Del C. Sepulveda and Ignacio Machado, mentioned by Commissioner Drummond, reflect that the inner bay was covered by waters, and was a lake. (See California Supreme Court opinion at page A-6.) The public trust

easement exists in inland waters as well as tidal waters. (See page A-1 and State of California v. Superior Court (Lyon) (1981) 29 Cal. 3d 210, 172 Cal. Rptr. 696.)

Finally, it should be noted that Commissioner Drummond's decision is dated April 30, 1873. This was 23 years after California became a state and a sovereign. While the determination as to the boundary of the Ballona Rancho certainly "related back," we submit that determinations beyond the jurisdiction of the Surveyor-General could not "relate back." The State of California was not a party to the boundary proceedings. Thus it would appear that neither res judicata nor collateral estoppel could apply as to the nature of the "inner bay."

CONCLUSION

It is respectfully submitted that this Court held in 1855 that the questions raised by the petition for writ of certiorari are not federal questions. It has reaffirmed that holding several times since then. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 82-708

IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

REPLY BRIEF OF PETITIONER

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No. 82-708

IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

REPLY BRIEF OF PETITIONER

Respondents do not dispute that the decision of the California Supreme Court has enormous importance, potentially affecting vast tracts of land in California. (Pet., pp. 3, 10-11.) Instead, their main thrust is that there is no federal question jurisdiction both because the Equal Footing Doctrine was assertedly first raised in the petition and because the decision below is claimed to involve only state law questions as to the nature and quality of the rights under a confirmed Mexican land grant. In addition, they argue that under federal law, the State's claimed "public trust" property interest was outside the scope of the 1851 Act confirmation process.

I. FEDERAL QUESTIONS ARE CONTROLLING.

Respondents' position that there is no federal question is based upon a fundamental misunderstanding of the decision of the California Supreme Court. That decision held: (1) that on Mexico's cession of California, the United States "succeeded to the ownership" of a reserved Mexican interest in petitioner's property (App. A-1, p. A-10); (2) that the federal government "retained" this interest when it issued its patent to petitioner's predecessors (*id.*, p. A-15); and (3) that "this interest was acquired by California upon its admission to statehood." (*Id.*)

Although the lower court did not refer to the Equal Footing Doctrine by name, its holding that California succeeded to a purported federal property interest in petitioner's land "upon its admission to statehood" is unmistakably Equal Footing language. *See, e.g., United States* v. *Texas,* 339 U.S. 707, 716 (1950); *Weber* v. *Board of Harbor Commissioners,* 85 U.S. (18 Wall.) 57, 65 (1873); *Pollard's Lessee* v. *Hagan,* 44 U.S. (3 How.) 212, 228-229 (1845). The totality of the opinion leaves no doubt as to the principle being applied. Indeed, while respondents protest petitioner's reference to the Equal Footing Doctrine by its long-established label, they fail to suggest any alternative principle on which to base the purported transfer of the United States' "ownership" to California.[1]

The central issue in this case is whether the State owns the interest it claims in the shallow wetlands belonging to petitioner. The resolution of that issue depends upon whether under the Equal Footing Doctrine such an interest passed from the United States to California upon its admission to the Union. That issue is governed by federal law, as this Court emphasized only last term:

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[1] In the trial court the State's claim to this property interest was also phrased in clear Equal Footing terms. Its cross-complaint asserted that the State "derives its title to and interest in Ballona Lagoon by virtue of its admission on September 9, 1850, as one of the sovereign states of the United States." (C.T. 117.)

> "Federal law governs the scope of title initially vested by the equal-footing doctrine . . . ." *California, ex rel. State Lands Commission* v. *United States,* 102 S.Ct. 2432, 2440n.14 (1982).

See also State Land Board v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 370-371, 377-378 (1977).

Respondents rely upon *Los Angeles Milling Co.* v. *Los Angeles,* 217 U.S. 217 (1910); *Devine* v. *Los Angeles,* 202 U.S. 313 (1906); and *Hooker* v. *Los Angeles,* 188 U.S. 314 (1903), to support their argument that the issues presented here involve only the nature and extent of rights in land and that these are traditional state law questions.[2] However, these cases have no application in the present context because they were all controversies between competing holders of confirmed Mexican grants over their respective rights in certain waters. In contrast, the State's claimed "public trust" interest has never been confirmed, and the issue is its *existence,* not its nature or extent.[3]

II. CALIFORNIA'S CLAIMED INTEREST IN PETITIONER'S LAND WAS ABANDONED BY ITS NONASSERTION IN THE 1851 ACT PROCEEDINGS.

In addition to challenging federal jurisdiction, respondents contend that the "public trust" property interest the State

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[2] The State also relies upon *Hyman* v. *State Lands Com'n of State of Cal.,* 543 F. Supp. 118 (C.D. Cal. 1982), *appeal pending,* in arguing that there is no federal question presented by the dispute over ownership of Ballona Lagoon (Br. in Opp., pp. 15-16), but it fails to mention that *Hyman* was decided before the California Supreme Court decision in this case. It is the ground of the supreme court decision, namely that the asserted State property interest was purportedly received from the United States upon California's admission to the Union, that establishes the controlling effect of federal law.

[3] Petitioner does not contend that the Equal Footing Doctrine operates to make every subsequent question concerning land acquired by a State on its admission a federal one. *See State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 370-371, 377-378 (1977). On this petition, the issue is not the nature or extent of a recognized state interest, but rather whether California, as successor to the United States, was initially vested upon statehood with the property interest it claims, and that is a federal question. *Id.*

claims in petitioner's land survived the confirmation process notwithstanding that the claim was not presented to the Board of Land Commissioners. Respondents make this argument in an attempt to circumvent the established rule that a claim to land, even if it existed under Mexican law, was abandoned by its non-assertion in the 1851 Act proceedings. *Barker* v. *Harvey,* 181 U.S. 481, 490 (1901); *United States* v. *Title Insurance Co.,* 265 U.S. 472, 484 (1924). In so arguing, respondents confuse the broad "public trust" property interest found by the California Supreme Court with the much narrower navigational easement which exists over privately owned navigable waters.

California law recognizes — and petitioner does not challenge — that there is a public right to traverse and fish navigable waters covering privately owned lands so long as the waters remain navigable. *See Bohn* v. *Albertson,* 107 Cal. App. 2d 738, 741, 238, P.2d 128, 131 (1951). This public right in navigable waters exists without regard to the character of the land at the time of statehood and without regard to whether any interest in the land was ever owned by the State. Reflecting the lack of any State property interest, the public's rights in this respect automatically terminate on the land's loss of its navigable character. *Id.* at 757, 238 P.2d at 140.

In contrast, the expansive "public trust" interest asserted by California is a permanent property interest which persists regardless of any change in the character of the land.[4] *Marks* v. *Whitney,* 6 Cal. 3d 251, 259-260, 98 Cal. Rptr. 790, 795-796, 491 P.2d 374, 379-380 (1971); *City of Long Beach* v. *Mansell,* 3 Cal. 3d. 462, 486-487, 91 Cal. Rptr. 23, 40, 476 P.2d 423, 440 (1970). It accordingly permits the State to utilize non-navigable and even dry land to the exclusion of the "fee" owner.[5]

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[4] Respondents do not dispute that California's tidelands "public trust" is a broad interest in property which gives the State the right to "possess" and even to "preserve" petitioner's land as open space without payment of compensation. (Pet., pp. 6, 10-11, 13.)

[5] Prior to the decision in the present case, the California courts had never suggested that this state property interest could arise in tidelands which the State never owned in fee. *See, e.g., People* v. *California Fish Co.,* 166 Cal. 576, 138 P. 79 (1913).

Despite the breadth of the claimed "public trust" property interest, respondents argue that it is not a claim to land required to be confirmed by the Board of Land Commissioners under the 1851 Act. The core of the argument is the assertion that the 1851 Act did not require presentation of a claim to land less than a full fee.[6] (Br. in Opp., pp. 18-20.) In so claiming, respondents mistakenly rely on language in *Fremont* v. *United States*, 58 U.S. (17 How.) 541 (1854), and *Townsend* v. *Greeley*, 72 U.S. (5 Wall.) 336 (1866).

The dictum respondents quote from *Fremont* is to the effect that mining rights were not within the jurisdiction of the Board of Land Commissioners. However, when that precise issue was ripe for decision, in *United States* v. *Castillero*, 67 U.S. (2 Black) 17, 166-169 (1862), this Court did not adhere to the *Fremont* dictum, but held that a claim to a mining right or privilege is a claim to land within the jurisdiction of the Land Commissioners under the 1851 Act. Thus, *Fremont* does not support the proposition that a property interest as extensive as California's "public trust" could be withheld from the 1851 Act proceedings and then asserted more than 100 years later.

The State's reliance on *Townsend* is similarly misplaced. *Townsend* held that, as between a Mexican grantee and third persons, an 1851 Act proceeding was not determinative of the capacity — trustee or beneficial owner — in which the grantee held title. But here there is no issue as to the capacity in which petitioner's predecessors held their title, and no claim that they held title as trustees. Rather, the California court's decision is that the State — as trustee — owns an interest in petitioner's land. *Townsend* is not authority that the 1851 Act proceedings lack conclusive effect simply because the State claims to be

[6] This claim is, of course, inconsistent with this Court's holdings in *Barker* v. *Harvey*, 181 U.S. 481 (1901), and *United States* v. *Title Insurance Co.*, 265 U.S. 472 (1924), that the failure to present a claim to a right of occupancy constituted an abandonment of the claim.

acting as "trustee" of the public in asserting an interest in former Mexican grant lands.[7]

On the contrary, the requirement of presentation to the Board of Land Commissioners applies as much to state Equal Footing claims in derogation of Mexican grants as to competing private claims. *Knight* v. *United States Land Association,* 142 U.S. 161, 184 (1891). The state supreme court's failure to so hold warrants examination by this Court.

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[7] The State also cites *New Orleans* v. *United States,* 35 U.S. (10 Pet.) 662 (1836), and *Eldridge* v. *Trezevant,* 160 U.S. 452 (1896), but they are no support for the assertion that the "public trust" property interest could be withheld from the 1851 Act proceedings. Those cases both arose in Louisiana where, as explained in *Fremont* v. *United States,* 58 U.S. (17 How.) 541, 553-556 (1854), a very different statute and grant system governed. *New Orleans* involved questions of title to certain land in the city and the federal government's attempted exercise of police power over the land. *Eldridge* involved Louisiana's levee servitude which attaches to lands on the shores of rivers subject to overflow. Although the opinion adverted to French and Spanish precursors of this servitude, the law of the prior sovereigns was held to be irrelevant because the levee servitude, as expressly created by the Louisiana Civil Code, was a valid exercise of state police power. 160 U.S. at 463-464, 468-469.

CONCLUSION

For these reasons, and the reasons set forth in the petition, a writ of certiorari should issue to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE CALIFORNIA LAND TITLE ASSOCIATION

In Support of Petition for Writ of Certiorari To the Supreme Court of the State of California

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I

THE INTEREST OF THE CALIFORNIA LAND TITLE ASSOCIATION STEMS FROM THE INSTABILITY WHICH THE DECISION BELOW CREATES IN TITLES TO 8½ MILLION ACRES OF LAND IN CALIFORNIA

The California Land Title Association ("CLTA") is a nonprofit association whose members represent 110 of the 139 title insurance companies and underwritten title insurance companies doing business in the State of California. For many years CLTA has acted as a spokesman and representative for its members in matters of common concern.

CLTA appeared below as amicus curiae in the proceedings before the California Court of Appeal and the California Supreme Court.

The members of CLTA have issued thousands of policies insuring title within confirmed Mexican land grants patented by the United States under the Act of March 3, 1851.[1] Based on the terms of that statute and the decisions of this Court, title insurers concluded that the federal confirmatory patents to these Mexican grants constituted unassailable "base title" to the lands encompassed within the patents. Until the decision below, it was deemed unnecessary to look behind the patents to determine whether they were subject to any latent title defects or encumbrances. As a result, when the source of title to lands was a federal patent reflecting unencumbered fee title, title insurers uniformly issued policies insuring against the risk that title was encumbered with a "public trust" easement in favor of the State of California.

Departing from its own prior decisions and those of this Court,[2] the California Supreme Court has now ruled that the State of California is the holder of a public trust

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[1] "An Act to Ascertain and Settle Private Land Claims in the State of California," 9 Stat. 631 (1851).

[2] On numerous occasions this Court has recognized that the state received no interest in federally-patented tidelands within Mexican land grants and that the federal patent was conclusive evidence of the patentee's interest in the granted lands. *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 492 (1866); *Knight v. United Land Assn.*, 142 U.S. 161, 184 (1891); *San Francisco v. LeRoy*, 138 U.S. 656, 670-671 (1891); *United States v. Coronado Beach Co.*, 255 U.S. 472, 487-488 (1921). Until the decision below, California Supreme Court decisions were in accord. *Teschemacher v. Thompson*, 18 Cal. 11, 26 (1861); *Leese v. Clark*, 18 Cal. 535, 563 (1861); *People v. San Francisco*, 75 Cal. 388, 398, 17 P. 522, 526 (1888).

easement which arose under Mexican law, passed to the United States upon the cession of California from Mexico, was silently reserved in the federal patent confirming the Mexican grant and then passed from the United States to the state upon the admission of California to the Union.[3] The public trust easement is a title defect of such magnitude that to hold it was silently reserved in patents issued under the 1851 Act is the functional equivalent of concluding that no title at all passed to tidelands covered by the patents. The easement empowers the state to physically invade the land, to dictate the uses to which the land must be devoted, or to prevent any private use whatsoever of the property—all without compensating the landowner for the value of his land. It has been held that the state retains this public trust interest even after the lands become dry.[4]

The public trust is not, then, simply an element of the state's police power to regulate navigable and ecologically sensitive areas for the public good.[5] It is a property inter-

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[3] *City of Los Angeles v. Venice Peninsula Development Properties*, 31 Cal.3d 288, 644 P.2d 792 (1982), Appendix to Petition for Writ of Certiorari, pp. 13-15. References to the California Supreme Court decision will hereafter be cited as "App. at . . ."

[4] See discussion of the scope of the public trust easement at pp. 9-10, *infra*.

[5] Wetlands in California are already subject to an impressive list of federal and state regulatory schemes designed to prevent unnecessary development of ecologically sensitive lands. Rivers and Harbors Act of 1899, 33 U.S.C. § 402 *et seq.*; Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*; Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.*; Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. § 1431 *et seq.*; Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*; National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*; California Environmental Quality Act, Pub. Res. Code § 21000, *et seq.*; California Wetlands Preservation Act, Pub. Res. Code § 5810 *et seq.*; California Coastal Act, Pub. Res. Code § 30000 *et seq.*

est which serves to transfer to the state the most fundamental rights associated with land ownership.

Title to over 8½ million acres of California land is based on federally-patented Mexican land grants.[6] With few exceptions, these grants did not include beaches or navigable water bodies such as bays, rivers and lakes. However, shallow lagoons, sloughs, streams and ponds were often included within the boundaries of the grants.[7] Many of these areas are presently dry land and have been extensively developed. The Ballona Lagoon involved in this case is an example. It is now known as Marina Del Rey and is the site of substantial improvements consisting of private marinas, single-family residences, high-rise condominiums, office buildings and commercial complexes.[8] Comparable developed former wetlands exist in Mexican land grants along the coast in San Diego, Oceanside, Huntington Beach, Laguna Beach, Long Beach, Santa Monica, Santa Barbara, Santa Cruz, Oakland and San Francisco.[9]

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[6] Cowan, R., *Ranchos of California, passim* (1977). See Exhibit 1 attached hereto, a map prepared by the United States Department of Interior in 1885 depicting confirmed Mexican land grants in California. The Mexican grants are highlighted in green.

[7] It appears that lagoons were not considered by the Mexican governors of California to be part of the Pacific Ocean, because they were consistently included within grants which, like the grant here at issue, were bounded by the "seashore."

[8] See Exhibit 2 which depicts the location of the "inner bay" shown on the map of the Rancho Ballona and held to be tidelands by the court below in relationship to existing lands and improvements in Marina Del Rey.

[9] A comparison of the official rancho plats and modern quadrangle maps prepared by the United States Geological Survey establishes that many wetlands within Mexican land grants have been intensely developed. For example, tidal sloughs within developed portions of San Francisco were the subject of *City and County of San Fran-*

The State of California and the City of Los Angeles contended in the proceedings below that such dry and improved lands were subject to the burdensome public trust servitude. The California Supreme Court refused to exempt dry lands from the scope of its decision.[10] Armed with this ruling, the California State Lands Commission and the California State Coastal Commission are now actively claiming that the public trust exists over dry and developed properties.[11]

The effect of the decision below is not limited to private lands. The United States owns 90 miles of California coastline which it acquired from private owners of confirmed rancho grants. Included within these holdings are Ft. Ord Army Base, Vandenberg Air Force Base, Port Hueneme Naval Base, Point Mugu Naval Air Station, Terminal Island Naval Station, Camp Pendleton Marine Corps Base and United States Naval Station North Island.[12] Because the United States could take no better title than its private predecessors, wetlands and former wetlands within these federal holdings are not insulated from the public trust claims of the state.

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cisco v. LeRoy, 138 U.S. 656 (1891) and *Knight v. United Land Assn.*, 142 U.S. 161 (1891), in which this Court held that the State of California acquired no interest in tidelands within Mexican land grants.

[10]App. at 16, Footnote 15.

[11]The Coastal Commission has prepared a series of "redline" maps delineating those areas in which the public trust may exist. Both improved dry lands and existing wetlands are encompassed within the areas claimed to be subject to the trust.

[12]California State Lands Commission, *Inventory of Ungranted Tidelands: Survey Priority Study, passim* and Appendix C (1981).

In short, if the California decision stands, title to vast areas of federally-patented Mexican grants will remain clouded. Title insurers, caught in an irreconcilable conflict between the decision below and a series of decisions by this Court, cannot insure clear title to these properties. Without the security of a title insurance policy showing title free of the public trust easement, it is highly unlikely that purchasers will buy or lending institutions will finance the purchase of property or the construction of improvements. As a result, the sale and development of affected lands will come to a standstill so long as the possibility remains that the public trust easement was reserved. It is therefore in the interest of the members of CLTA as well as thousands of California landowners and potential purchasers that this Court review the decision below.

II

REASONS FOR GRANTING THE WRIT

CLTA concurs in and adopts the reasons for granting the writ set forth in the Petition of Summa Corporation for a Writ of Certiorari. There are, however, two additional points meriting discussion. First, the California court's decision that a patent which on its face transfers unencumbered fee title is nonetheless subject to an implicit reservation of the public trust easement is incompatible with Section 15 of the 1851 Act which provides that the patent is conclusive evidence of title. Second, by holding that the lands at issue were tidelands in 1850, notwithstanding a decision to the contrary by the United States General Land Office, the California Supreme Court has invited a reexamination of the decisions of that office and called into question

the finality of the factual determinations on which the issuance of all federal patents is based.

A. The Decision of the California Supreme Court is Incompatible with Section 15 of the 1851 Act

Section 15 of the 1851 Act provides that the federal patent confirming a Mexican land grant is conclusive against the United States. Accordingly, this Court has held that the United States and its successors, including the State of California, are bound by the federal patent. *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 492 (1866). The patent conclusively establishes title regardless of whether the property is tidelands. *United States v. Coronado Beach Co.*, 255 U.S. 472, 487-488 (1921); *City and County of San Francisco v. LeRoy*, 138 U.S. 656, 670-671 (1891); *Knight v. United Land Assn.*, 142 U.S. 161, 184 (1891). This federally-patented title is unassailable despite the existence of potentially valid claims which were not asserted at the time of the confirmation proceedings. *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 481-482 (1924).

In *Beard v. Federy* this Court examined at length the binding effect of a United States patent issued under the 1851 Act:

> [T]he patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. . . . When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was

> valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. *As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie.* 70 U.S. (3 Wall.) at 491-492. (Emphasis added.)

Faced with this and similar rulings, the California Supreme Court conceded that a patent issued pursuant to the 1851 Act is binding evidence of the title to and boundaries of the grant. The court even admitted that the patent was conclusive when it included tidelands.[13] Nonetheless, the court ruled that the conclusive effect of the patent was limited to bare legal title and did not extend to whether that title was subject to an implicit reservation of the public trust easement.[14]

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[13]App. at 13.

[14]It is not entirely clear whether the California court applied state or federal law in reaching this result. In the proceedings below, the City and the State argued that this case was governed by state law, citing *Los Angeles Farming & Milling Co. v. Los Angeles*, 217 U.S. 217 (1910) and related cases holding that disputes over rights to use water from the Los Angeles River were governed by state law. The *Los Angeles Milling* line of authority is not, for a number of reasons, applicable to this case. First, *Los Angeles Milling* involved a dispute between two Mexican land grant patentees. As to those parties, the federal patent is nothing more than a confirmation of rights under Mexican law and is not the source of a federally-created right giving rise to a federal question. The rule is different in disputes involving a successor to the

By holding that the patent is binding on the issue of the patentee's underlying title but not as to the existence of the public trust easement, the California court has virtually nullified the conclusive effect of patents issued pursuant to the 1851 Act. Conclusive title encumbered by the public trust easement is not "title" to real property as that term is normally understood. The public trust easement is a title defect of unparalleled magnitude which effectively destroys private ownership of encumbered lands. In the exercise of the easement, the state may prevent trust

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United States, where the patent serves an additional function; it is conclusive evidence of the patentee's title. This is so because under Section 15 of the 1851 Act the patent is conclusive evidence only against the United States and its successors but not against third parties claiming under a confirmed grant from the Mexican government. Consequently, as between two patentees of Mexican land grants, state law controls the respective rights of the parties. However, as between a patentee of a Mexican land grant and a successor of the United States, including the State of California, the patentee is the beneficiary of a federally created right—the conclusiveness of the title conveyed by the federal patent—and federal law governs. *California Powder Works v. Davis*, 151 U.S. 389, 394 (1893).

Second, the federal patent is more than a confirmation of rights governed by Mexican or local law as against a party who failed to present his claim to the Board of Land Commissioners. Under Section 8 of the 1851 Act any person who claimed lands based on a right or title derived from Mexican law was required to present that claim to the Board for confirmation. Upon failure to do so, the claim was deemed abandoned, *regardless* of whether it was recognized under Mexican law. *United States v. Title Insurance & Trust Co.* 265 U.S. 472, 481-482 (1924).

Finally, state law is not controlling because this case involves the construction of the 1851 Act; specifically, whether the conclusive effect of a patent under Section 15 extends to the public trust easement and whether the provision of Section 8 mandating the presentation of claims to the Board of Land Commissioners applies to the State of California.

lands from being used at all—even by their owners—so that they remain in their natural condition. *Marks v. Whitney*, 6 Cal.3d 251, 259-260, 491 P.2d 374, 380-381 (1971). The easement authorizes the state to control access to trust lands, to physically invade the property and to dictate the use or "trust purpose" to which the land must be devoted.[15] The proper trust purposes which the state may prescribe are virtually unlimited.[16] The state may exercise these powers without paying compensation for the land's value and regardless of whether the property is now dry.[17]

Therefore, if the United States reserved the public trust easement when it issued a patent under the 1851 Act, the United States retained rights fundamental to property ownership; the patentee, on the other hand, received an interest so limited that it has been described as "naked title to the soil." *People v. California Fish Co.*, 166 Cal. 576, 598, 138 P. 79, 88 (1913). The California court's holding that the conclusive effect of a United States patent is limited to this nominal interest strips virtually all meaning from Section 15 of the 1851 Act. In fact, the elaborate stat-

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[15]*People v. California Fish Co.* 166 Cal. 576, 588-589, 138 P. 79, 84 (1913); *Marks v. Whitney* 6 Cal. 3d 251, 260-261, 491 P.2d 374, 380-381 (1971).

[16]Proper trust purposes have been held to include harbor development, hydrocarbon, geothermal and mineral exploration and development *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928), *Mallon v. City of Long Beach*, 44 Cal.2d 199, 282 P.2d 481 (1955), California Pub. Resources Code § 6501-7062; a YMCA building *People v. City of Long Beach*, 51 Cal.2d 875, 338 P.2d 177 (1959); and keeping land in its natural state as a bird and wildlife sanctuary *Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374 (1971).

[17]*Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 401, 60 P. 2d 825, 828 (1936); *Marks v. Whitney* 6 Cal. 3d 251, 259-261, 491 P.2d 374, 380-381 (1971).

utory scheme established by Congress for verifying Mexican claims would be seriously compromised if the sole effect of the confirmation proceedings were to confirm bare legal title.

The cited basis for the California court's determination that a public trust easement existed under the laws of Mexico was Law III and Law VI of Title XXVIII of *Las Siete Partidas*, the law in effect when California was a part of Mexico.[18] If the public trust easement allegedly established by those two laws was unaffected by the confirmation proceedings, it follows that other public rights recognized under Mexican law would likewise survive the issuance of the federal patent. For example, Law IX of *Las Siete Partidas* provides that "fountains," "the places where councils meet," "the sandy beaches on the banks of rivers," "the commons and roads traversed by horses," "mountains," and "pastures" are the "common property of all."[19] Under the reasoning of the California Supreme Court, public rights in "fountains," "mountains," "pastures," etc. which existed during Mexico's dominion over California would continue despite the issuance of a United States patent purporting to transfer unencumbered fee title. The patentee, although possessed of "conclusive" legal title, would nonetheless be deprived of the very essence of property ownership—the right to use his land to the exclusion of others. In such circumstances, as in the case of the public trust easement, the "conclusive" federal patent would be of negligible value as an "instrument of quiet and security to its possessor." *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491-493 (1866).

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[18]App. at 8-9.

[19]*Las Siete Partidas*, CCH (Spain) (1931).

In short, by holding that a federal patent is subject to implicitly reserved public rights, the court below has called into question the integrity of title to all federally-patented Mexican land grants. There is a clear and irreconcilable conflict between the California Supreme Court decision, Section 15 of the 1851 Act and numerous decisions of this Court establishing the conclusiveness of federal patents. CLTA submits that this conflict, and the instability it creates in land titles throughout California, are substantial and persuasive reasons for granting the Petition of Summa Corporation for a Writ of Certiorari.

B. The Decision of the California Supreme Court Disrupts the Stability of Federally-Patented Land Titles by Inviting a Reexamination of Final Decisions of the United States General Land Office

The decision below rests upon the California court's factual determination that the lands at issue were tidelands at the time of statehood in 1850. As detailed in the brief of petitioner Summa Corporation, that finding is in direct conflict with the 1873 decision of the United States General Land Office that the "inner bay" depicted on the plat of the Rancho la Ballona was *not* an arm of the sea. The California court's reexamination of the evidence regarding the physical character of the lands in issue opens a Pandora's box which threatens to undermine the finality of the factual determinations on which the issuance of all federal patents is based.

This Court has repeatedly ruled that decisions of the General Land Office on questions of fact within its jurisdiction are final and unassailable in any collateral proceeding. *Heath v. Wallace*, 138 U.S. 573, 585 (1891); *French v.*

Fyan, 93 U.S. (3 Otto) 169, 171 (1876); *Johnson v. Drew*, 171 U.S. 94, 99 (1898); *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. (16 Otto) 447, 451 (1882). The leading case, *Heath v. Wallace*, illustrates that the rule applies with full force to determinations of the physical character of lands. That case involved the question of whether certain land designated on a map as "subject to periodical overflow" qualified as "swamp and overflowed" lands within the terms of the Act of September 28, 1850 (9 Stat. 519), granting such swamplands to the states. This Court noted that while the phrase "subject to periodical overflow" was ambiguous, any ambiguity had been conclusively resolved by the land department:

> It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country. We are of the opinion, therefore, that the decision of the land department on a question of the actual physical character of certain lands is not subject to review by the courts. 138 U.S. at 585. (Citations omitted.)

The decision below merits review by this Court because it contravenes the foregoing rule and has severe consequences for the owners of federally-patented Mexican land grants as well as other federal patentees. If the factual basis of a General Land Office decision is open for re-examination 110 years after the decision is rendered, federally-confirmed land titles would be subject to endless upheaval. Any party asserting an interest in the patented land could compel the patentee to re-establish the validity of his claim, his right to the confirmation, the correctness of the decisions of the Board of Land Commissioners and the

General Land Office and even the validity of the decrees of the district court and of this Court upholding the grant. The patentee could find his claim recognized in one suit and rejected in another solely because different tribunals reached different conclusions regarding whether the evidence justified the land department's issuance of a patent. The patentee's title would be made to depend, not on the integrity of the federal patent, but rather on the fluctuating prejudices of different juries and their varying capacities to weigh the evidence. It is precisely these considerations which led this Court to conclude that decisions of the General Land Office in general, and patents issued pursuant to the 1851 Act in particular, are conclusive and invulnerable to collateral attack. *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491-493 (1866); *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. (16 Otto) 447, 451 (1882).

Thus, if the decision below is not reviewed, owners of federally-patented Mexican land claims will be left in the precarious position of not knowing whether their property, after a reweighing of the evidence regarding its character in 1850, will be found to be tidelands subject to the public trust. Moreover, since the California Supreme Court refused to exempt dry lands from the scope of its decision, landowners cannot even rely on the fact that their lands are presently dry for assurance that the property is not legally "tidelands" burdened with the public trust easement.

Finally, if taken to its logical conclusion, the California Supreme Court decision has even wider and more disturbing ramifications. In its administration of the public land laws, the General Land Office was charged with the responsibility of making countless factual determinations regarding such matters as the qualifications of the purchaser, the

nature of the land and whether the property was open for sale. Such determinations have been repeatedly held to be unassailable in any collateral proceeding. *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. (16 Otto) 447, 451 (1882). However, if a decision of the land office regarding the character of patented Mexican land grants may be reopened, what is to prevent similar challenges to the factual determinations of the department underlying all federal patents?

This potential for disastrous consequences only serves to illustrate that the California court has departed radically from a well-reasoned body of law developed by this Court to assure the integrity of United States patents and the stability of federally-patented land titles. CLTA submits that the court's refusal to follow the controlling precedents of this Court and to respect the decisions of the tribunals selected by Congress to verify Mexican land claims must not go unchecked. The California Supreme Court is increasingly bold in its disregard of private property rights,[20] so much so that the court actually supported its decision below on the "policy" ground that any other result would require the City of Los Angeles to pay just compensation to the landowners.[21] When the highest court of Cal-

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[20]In *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 606 P.2d 363, *cert. denied* 449 U.S. 840 (1980) the Court extended the public trust easement to lands surrounding San Francisco Bay sold by the State Board of Tideland Commissioners in the 1870's, overruling its decision in *Knudson v. Kearney*, 171 Cal. 250, 152 P. 541 (1915). In *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 625 P.2d 238 (1981), *cert. denied* (October 5, 1981, No. 81-163) the Court extended the public trust servitude to lands between the high and low water lines in navigable lakes notwithstanding the provisions of Civil Code Section 830 and numerous court decisions limiting any state interest to low water.

[21]App. at 15.

ifornia uses the circumvention of federal constitutional rights as a justification for its holding, it is clear that this Court is the last resort and only hope for landowners seeking to vindicate their rights under the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

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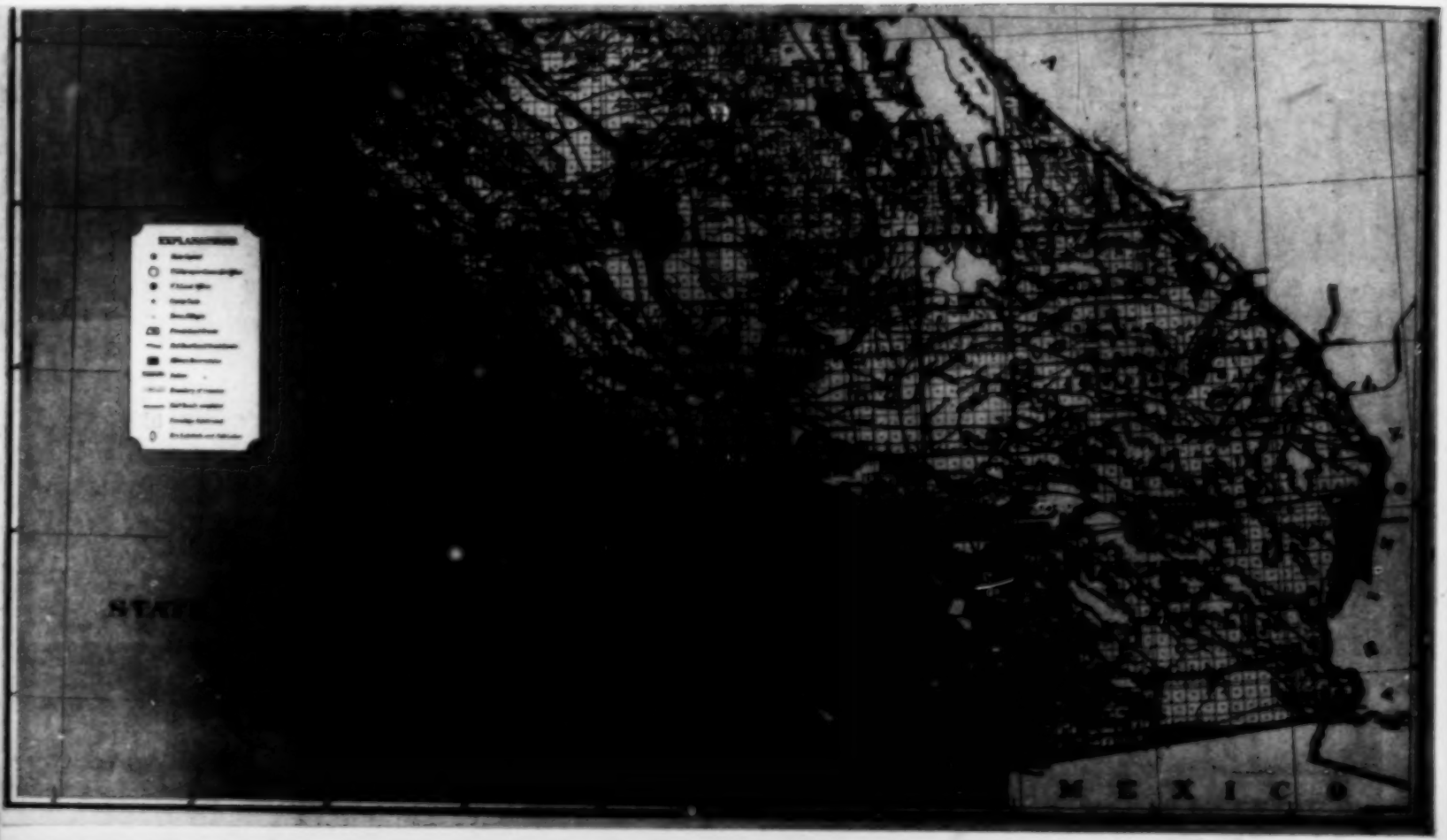
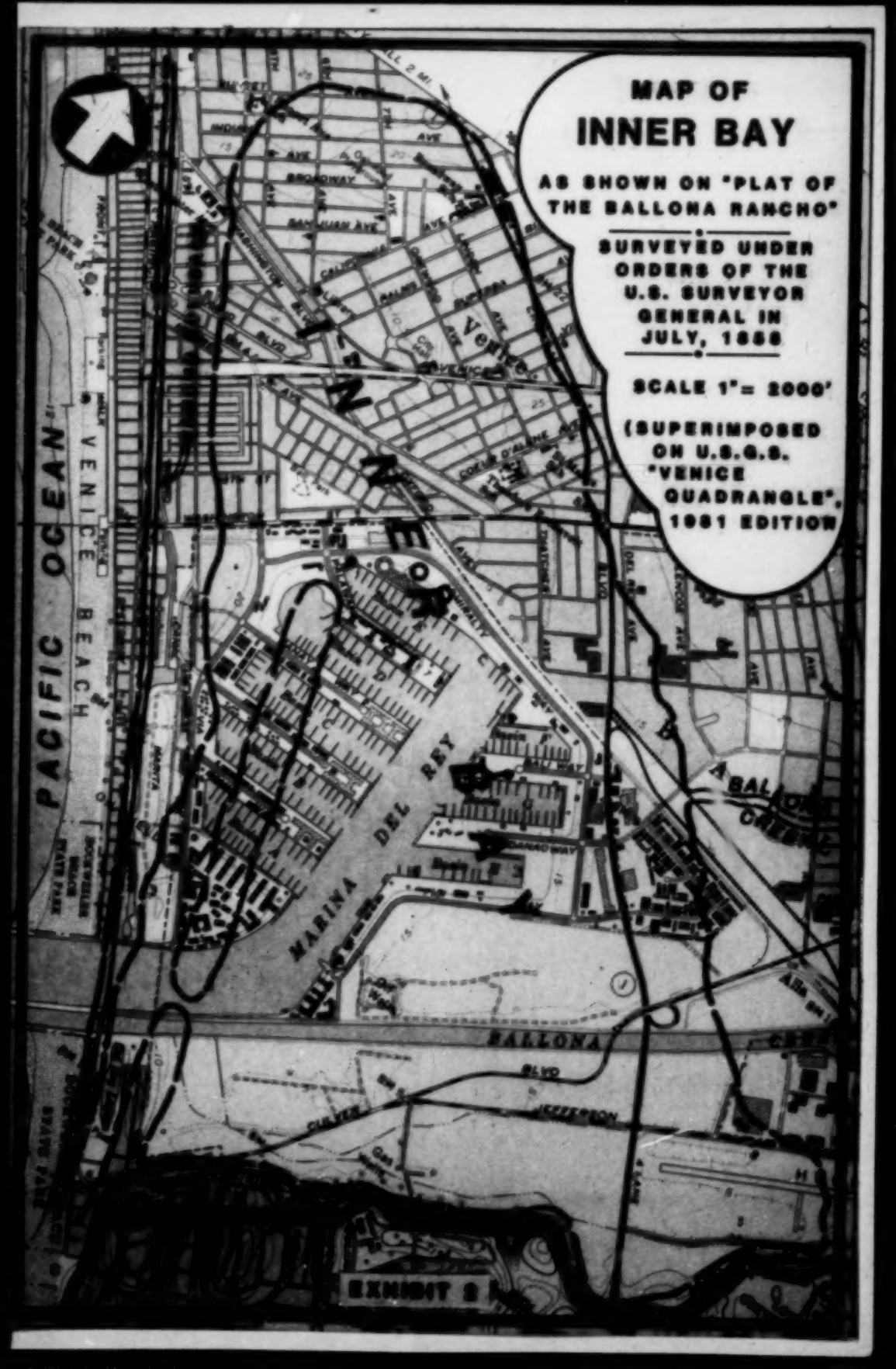
December, 1982

Exhibit 1


MEXICO


MAP OF
INNER BAY
AS SHOWN ON "PLAT OF THE BALLONA RANCHO"
SURVEYED UNDER ORDERS OF THE U.S. SURVEYOR GENERAL IN JULY, 1888
SCALE 1"= 2000'
(SUPERIMPOSED ON U.S.G.S. "VENICE QUADRANGLE", 1981 EDITION
PACIFIC OCEAN
VENICE BEACH
MARINA DEL REY
BALLONA
BLVD
JEFFERSON
EXHIBIT 2

Office-Supreme Court, U.S.
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No. 82-708

In the Supreme Court of the United States

OCTOBER TERM, 1982

SUMMA CORPORATION, PETITIONER

v.

STATE OF CALIFORNIA EX REL. STATE LANDS COMMISSION AND CITY OF LOS ANGELES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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STATE OF CALIFORNIA EX REL. STATE LANDS COMMISSION AND CITY OF LOS ANGELES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This Memorandum is submitted in response to the Court's invitation of January 17, 1983. We conclude that the petition properly presents several questions of federal law, that these were wrongly decided by the California Supreme Court, that the issues are of substantial importance both to private landowners and to the United States, and, accordingly, that certiorari should be granted.

STATEMENT

The present controversy concerns a small and very shallow tidal body of water south of Venice, California, the remnant of a substantially larger "inner

bay" connected to the Pacific Ocean. See Pet. 3-5; Pet. App. A-2, A-36, A-52 to A-53. It is common ground that the lands underlying the "lagoon" are privately owned and have been since they were included in a Mexican grant in 1839, a grant confirmed by the United States, after elaborate proceedings, by issuance of a patent encompassing the lagoon in 1873. See Pet. App. A-2, A-4 to A-5, A-8. The City of Los Angeles and the State of California nevertheless assert the right to dredge the lagoon, construct sea walls, make other improvements therein, and to open it to public navigation, fishing and recreation, all without exercising the power of eminent domain, and instituted judicial proceedings to vindicate these claims. Pet. App. A-2 to A-3, A-36 to A-37.

The Superior Court sustained the plaintiffs' position, primarily on the ground that the State enjoyed a "public trust easement" over the lands which included the rights asserted. Pet. App. A-59. Additionally, the court concluded that the previous owners had "dedicated" the lands in question to public use. Pet. App. A-60. Both holdings were reversed by the intermediate appellate court. Pet. App. A-35 to A-45. But a divided California Supreme Court in turn set aside the intervening ruling and affirmed the trial court. Pet. App. A-16, A-34. The Supreme Court did not reach the "dedication" claim, resting its judgment solely on the "public trust" doctrine. Pet. App. A-16. We discuss in a moment the path to decision followed by that court.

Respondents now assert that no federal question is presented and that this Court lacks jurisdiction to review the judgment below. Cal. Br. in Opp. 2, 11-12; L.A. Br. in Opp. 4, 25-29. Petitioner disagrees, correctly in our view. Reply Br. 2-3.

DISCUSSION

A. Federal Law Questions Are Properly Presented

It may be that the California Supreme Court could have reached much the same result without deciding any of the questions of federal law now presented. Thus, it might have held that, as a matter of current State law, all water bodies of a certain size—regardless whether defined by federal law as "arms of the sea" or "tidal" or "navigable waters"—are preserved for public use and cannot be filled, drained, or enclosed, or, at least, that the State may exercise its police power to protect such water bodies, to improve them and to regulate public access there; and that these sovereign prerogatives attach whether or not the underlying lands, submerged or tidelands, are in private ownership, and without regard to the source of the private title.

Of course, such a holding could have been challenged on the ground that the California rule, when first announced or applied, amounted to a "taking" of private property without compensation, in violation of the Fifth and Fourteenth Amendments. See *Hughes* v. *Washington*, 389 U.S. 290, 294-298 (1967) (Stewart, J., concurring). So, also, a substantial federal question would be presented if that rule were sought to be applied where the United States remains the owner of the littoral lands. See *California ex rel. State Lands Commission* v. *United States*, No. 89, Original (June 18, 1982), slip op. 8-11, 13-14. But there would then be no issue under the federal patents or the legislation providing for confirmation of Mexican grants, nor any question implicating the Treaty with Mexico or the Equal Footing Doctrine.

As it happens, however, the California Supreme Court rested its decision on a very different basis—

perhaps to avoid the "taking" problem. There is not the slightest ambiguity about the course of reasoning followed by the California Court. It consists of four principal steps, each treated as essential to the result. In the court's own words, the four dispositive questions, all except the third answered in the affirmative, were:

1. "[W]hether the title [petitioner's] predecessors received from Mexico [in 1839] was subject to the rights of the public [now claimed by the State and City]" (Pet. App. A-8); and, if so—
2. "[W]hether the United States acquired these rights upon annexation of California [in 1848]" (*ibid.*; see also *id.* at A-9); and if so—
3. "[W]hether those rights [—having been held in suspense pending the confirmation proceedings—] were relinquished [by the United States to the Mexican grantees] by issuance of the patents [to them in 1873]" (*id.* at A-11); and, if not—
4. Whether, "when California was admitted to the Union, it succeeded to [these] rights of the United States" (*id.* at A-8; see also *id.* at A-15).

Quite obviously, none of these is an issue of California law. The first question involves the law of Mexico; the second depends on the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922; the third is governed by the congressional Act of Mar. 3, 1851, ch. 41, 9 Stat. 631, as supplemented by the Act of July 1, 1864, ch. 194, 13 Stat. 332, and by federal administrative and judicial determinations made, and patents issued, pursuant to those statutes; and the fourth requires application of the Equal Footing Doctrine, a rule of federal constitutional law. Indeed,

under the approach followed by the California Supreme Court, State law plays no role until it is determined that the property rights in issue inured to California, and then the only question is whether the State has chosen to retain those rights for the benefit of the public, or has relinquished them to the owner of the water bottoms. As to that matter—never seriously at issue—this Court must of course accept as final the answer given by the highest California tribunal. But it seems to us plain that this determination directly rests on decision of several federal law questions which are open to re-examination here.[1]

In light of the explicit rulings of the California Supreme Court, it is unnecessary to parse the pleadings and the arguments raised by the parties at every stage of the proceedings. *E.g.*, *Whitney* v. *California*, 274 U.S. 357, 360-361 (1927). If there are independent State grounds available to support the judgment below, they are no part of the case in this Court, since they were not invoked by the California Supreme Court, which chose to rest its decision on a

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[1] The three decisions of this Court relied on by Respondent California (Br. in Opp. 13-15), *Los Angeles Milling Co.* v. *Los Angeles*, 217 U.S. 217 (1910); *Devine* v. *Los Angeles*, 202 U.S. 313 (1906); and *Hooker* v. *Los Angeles*, 188 U.S. 314 (1903), do not dictate a different conclusion. Each of those cases, dismissed by the Court for want of jurisdiction, raised the distinct issue whether, by confirming a Mexican grantee's title to land, the federal patent process also resolved questions as to the grantee's entitlement to associated water rights. It was held that the federal patent process left those water rights issues to applicable local law, including state court construction of relevant foreign law. In this action, however, the question presented concerns the fullness of the title to land confirmed by the federal patent, an issue of federal law. See *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 22 (1935).

different basis. See *Orr* v. *Orr*, 440 U.S. 268, 274-277 (1979). Indeed, it is fair to read its opinion as announcing the court's view that the State could *not* now enjoy the "public trust" rights claimed *unless* those rights were reserved by Mexico, were ceded to the United States, were withheld from the patent, and were passed on to California by the United States. Accordingly, we believe the petition for certiorari, challenging these holdings, properly invokes this Court's jurisdiction under 28 U.S.C. 1257(3).

B. The Decision Below, So Far As It Rests On Resolution Of Federal Law Questions, Is Erroneous

We hesitate to attempt any all embracing definition of the California "public trust doctrine." It appears to be a very vigorous (not to say voracious) creature, still growing, both in size and strength.[2] Suffice it to say that, as applied in this case, the public trust rights recognized by the California Supreme Court amount to an estate in land of very pervasive character. Moreover, since the interest is held for the benefit of the public, the State's power of alienation is restricted. See *People* v. *California Fish Co.*, 166 Cal. 576, 597, 138 P. 79, 88 (1913). Cf. *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387, 452-453 (1892). But, most importantly for this case, vis-a-vis the title owner of the property, the public trust apparently constitutes a perpetual and comprehensive easement

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[2] See, *e.g.*, *State of California* v. *Superior Court (Lyon)*, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, cert. denied *sub nom. Lyon* v. *California*, 454 U.S. 865 (1981) (extending geographic scope of public trust doctrine beyond beds of tidal navigable waters to beds of nontidal, navigable waters); *Marks* v. *Whitney*, 6 Cal. 3d 251, 259-260, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971) (trust purposes broadened to include preservation of property in natural state).

or servitude that may wholly dispossess him of all the benefits of his land, save only the right to transfer the bare title (assuming an interested buyer).[8] Indeed, in the present decision, the California Supreme Court has expressly described the public rights held by the State within privately owned tidelands as creating at least approximately the same regime that obtains outside the area of the Mexican cession (north of Sonoma) where the State itself owns navigable water bottoms and tidelands. See Pet. App. A-15 to A-16.

There is the rub. Subject only to the paramount federal navigation servitude, it is of course entirely a matter for the State to regulate in the public interest lands permanently or periodically covered by navigable waters which inured to California under the Equal Footing Doctrine and remain in State ownership. And, provided it gave fair notice, the State is free to retain whatever easement it deems appropriate when it relinquishes to the riparian or littoral owner its title to tidelands or banks below high water mark. But when such lands were never in State ownership—because alienated before statehood—it is difficult to appreciate how California can claim the same interest in them or treat them as equally subject to the public trust doctrine.

Although lands underlying navigable waters normally inure to the State upon its admission to the Union, it is firmly settled that this constitutional principle—an aspect of the Equal Footing Doctrine—is inapplicable when the lands were previously alien-

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[8] Under California precedent, moreover, restrictions imposed by the trust can be invoked not only by the government, but also by a private citizen in a lawsuit. *Marks* v. *Whitney*, *supra*, 6 Cal. 3d at 261-262, 491 P.2d at 381-382, 98 Cal. Rptr. at 797-798.

ated by the United States, or by a prior sovereign in a conveyance confirmed by the United States pursuant to a treaty undertaking. See *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894); *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981). Perhaps the most notorious exception relates to Mexican grants, which not infrequently included water bottoms otherwise within the reach of the Equal Footing Doctrine. *E.g.*, *San Francisco* v. *Le Roy*, 138 U.S. 656, 670-671 (1891); *Knight* v. *United States Land Association*, 142 U.S. 161, 183-184 (1891); *United States* v. *Coronado Beach Co.*, 255 U.S. 472, 487-488 (1921). See also *Borax, Ltd.* v. *Los Angeles*, *supra*, 296 U.S. at 15, 19-21. According to the California Supreme Court, this is such a case. See Pet. App. A-8 & n.7. Yet, that court attempts to avoid the natural consequence by supposing that the title to the "lagoon" conveyed to the Mexican grantees, and later confirmed by the United States, was burdened with a pervasive public easement that effectively recaptures for the State the estate it would have enjoyed if no prior grant had been made. We cannot acquiesce in that result.[4]

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[4] We deem it unnecessary to determine whether the California Supreme Court was right in concluding (Pet. App. A-4 to A-7) that an ambiguity existed in the patent documentation, rendering permissible later judicial consideration of the actual tideland character of the "inner bay." Although the patent conclusively determines the physical, and thus the legal, boundaries of a claim, it does not necessarily follow that the patent provides the final word on the actual ecological characteristics of the subject property. Compare *Stewart* v. *United States*, 316 U.S. 354 (1942). Where we disagree with the court below, however, is in its assumption that the "tide lands" character of the land included in the patent could create a public trust property interest capable of slipping through the federal patent process and inuring to the State.

As we view it, the holding of the California Supreme Court violates the promise given in the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, Art. VIII, 9 Stat. 929 (Pet. App. A-96) that vested property rights would be "inviolably respected," and impermissibly impugns the final determination made (Pet. App. A-128) and the patent issued (*id.* at A-115) under the Act of Mar. 3, 1851, ch. 41, 9 Stat. 631 (Pet. App. A-108), which unreservedly confirm that the prior grant included the tidelands in suit. We doubt that Mexican law recognized the comprehensive public servitude now asserted by the State in respect of this very shallow water body. See *United States* v. *Coronado Beach Co.*, *supra*, 255 U.S. at 485-486. But that is not dispositive. What is perfectly clear is that during the protracted confirmation proceedings, California claimed no interest in the tidelands and the patent ultimately issued withheld no pervasive easement. That is the end of the matter. See *Thompson* v. *Los Angeles Farming & Milling Co.*, 180 U.S. 72, 77 (1901); *Barker* v. *Harvey*, 181 U.S. 481, 491-492 (1901); *United States* v. *Coronado Beach Co.*, *supra*, 255 U.S. at 487-488; *United States* v. *Title Insurance Co.*, 265 U.S. 472, 483-486 (1924).[5]

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[5] Neither of the two cases cited by respondent California (Br. in Opp. 20-23) for the proposition that the State's public trust property interest survived the federal patent process supports that claim.

In *New Orleans* v. *United States*, 35 U.S. (10 Pet.) 662 (1836), this Court did *not* hold that property owned by the United States was subject to a public trust restraint on alienation, notwithstanding a federal patent. The basis of the Court's ruling that the United States could not enjoin the City of New Orleans from advertising certain lots for sale was

To be sure, neither the law of Mexico nor the patent issued under the Act of 1851 can defeat the federal servitude attaching to all navigable waters of the United States by virtue of the Commerce Clause of the Constitution. Whether that servitude today applies to Ballona Lagoon in its present condition is not clear. See *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979). But this principle can in no event support California's claim. It is fundamental that the federal navigational servitude, where applicable, remains with the United States and is no part of the grant to newly admitted States under the Equal Foot-

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that the United States did not own or even have regulatory jurisdiction over the property in question. *Id.* at 736.

Nor can respondents derive much comfort from *Eldridge* v. *Trezevant*, 160 U.S. 452 (1896). At the end of the day, that decision holds no more than that a federal patent granting land apparently then owned by the United States did not nullify a limited servitude for the construction of levees for the public safety which had long before been announced in the local laws as applicable to lands bordering the Mississippi River and other rivers subject to overflow. As this Court noted, the rule was founded on a "doctrine existing in the Territory of Louisiana before its purchase by the United States and continuing to this time" and, in any event, was "explicitly asserted in the Civil Code of Louisiana." *Id.* at 463. Indeed, the same provision was included in the *Digest of the Civil Laws Now in Force in the Territory of Orleans*, approved by the Territorial Legislature and Governor Claiborne in 1808 (see Act of Mar. 31, 1808, Acts of the Terr. of Orleans, 2d Leg., 1st Sess., ch. 29, 120-128), and commonly known as the "Civil Code of 1808." See 16 West's LSA-C.C. 407 (1972). It was carried forward in the Civil Code of 1825 (Art. 661) and the Revised Civil Code of 1870 (Art. 665). *Ibid.* Thus, in the absence of anything to the contrary in the document, it was appropriate to construe a patent issued after the Louisiana Purchase (and presumably after 1808) as subordinating the estate granted to the then established levee servitude.

ing Doctrine. See *Montana* v. *United States*, *supra*, 450 U.S. at 551; *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 375-376 (1977). The United States reserved no other interest affecting these tidelands and passed none on to California.

Needless to say, we are not remotely suggesting that Mexican grant lands are uniquely immune from legitimate regulation by the State in the exercise of its police power. Indeed, California and its municipalities have not been shy on this score and we have had occasion to lend our support in defending such laws against a Fifth Amendment "taking" challenge. *E.g.*, *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621 (1981); *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980). But, here, California asserts something more, a property interest in the land, said to have been reserved by the United States and transferred to the State in 1850. This is a claim we cannot endorse.

C. The Federal Questions Decided Are Of Substantial Importance

Assuming the decision below is erroneous, the scope of the resulting mischief cannot be assessed with certainty. At least three questions arise: How many factually similar situations will be governed by the ruling? What are the predictable extensions of the doctrine espoused by the California Supreme Court if left uncorrected? And, to what extent would a like result be achievable through a legitimate exercise of the State's police power?

We can give no definitive answer. However, our own limited investigation tends to confirm the representations made on these points in the Amicus Curiae Brief for the California Land Title Association.

The State apparently does not challenge the significant scope of the decision. And the California Supreme Court itself recognized that it was breaking important new ground, applying the public trust doctrine for the first time to land never owned by the State (Pet. App. A-1 to A-2). See also the dissenting opinions of Justice Richardson (*id.* at A-20 to A-21, A-30) and Justice Kaus (*id.* at A-31 to A-32).[6]

We add two further considerations. The first is that, if left unreviewed, the decision of the California Supreme Court may well be emulated elsewhere. Indeed, since that holding depends on very broad propositions in no way confined to California, other States may be tempted to assert a like interest in submerged lands alienated by prior sovereigns—whether Mexico or Spain or France, or even Great Britain. Although one hopes other courts would decline the invitation to follow the lead of the California Court, it is not safe to assume that none would read the

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[6] While the court eschewed deciding whether the rule announced reaches former tidelands, now filled or reclaimed, that door was left invitingly open and there is every reason to suppose California will renew its claim in respect of such areas. See Pet. App. A-16 n.15. Indeed, if the State's interest in the tidelands vested upon its admission to the Union under the Equal Footing principle and the "open coast" rule of *Hughes* v. *Washington*, *supra*, re-affirmed in *California ex rel. State Lands Commission* v. *United States*, *supra*, is inapplicable, there would appear to be no federal law obstacle to California's continuing to assert that interest after natural or artificial causes had changed the physical character of the former tidelands. See *State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 376-378. And, as a matter of State law, it seems settled that "[r]eclamation [of tidelands] * * * does not ipso facto terminate the public trust." *Marks* v. *Whitney*, *supra*, 6 Cal. 3d at 261, 491 P.2d at 381, 98 Cal. Rptr. at 797.

silence of this Court as a signal that no principle of federal law stands in the way.

Finally, we must voice a concern on behalf of the custodians of federal lands acquired from the holders of Mexican (or other foreign) grants and now reserved to special uses. See Brief of Amicus Curiae California Land Title Association at 5. We are far from conceding that the United States would be subject to the same restrictions as private landowners. Yet, if California (and other States) are recognized to hold a property interest in such acquired lands, existing independently of any exercise of the police power, the special prerogatives and immunities enjoyed by the federal government may afford a less effective defense. It is obviously a matter of serious import if tidelands owned by the United States as part of a military or other reservation are subject to pervasive control by the State invoking its "public trust" rights.

In all the circumstances, we believe the case justifies the exercise of this Court's certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO THE MEMORANDUM FOR THE UNITED STATES.

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No. 82-708

IN THE

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Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

BRIEF IN OPPOSITION TO THE MEMORANDUM FOR THE UNITED STATES.

This brief is submitted in opposition to the views expressed by the United States in its Amicus Curiae Memorandum. The position therein taken is contrary to settled decisions of this Court and factual findings heretofore made in these proceedings. No federal question is presented, and accordingly, the Petition for Certiorari should be denied.

SUMMARY OF REASONS WHY CERTIORARI SHOULD BE DENIED.

Based upon the following summary of facts and law (including decisions of this Court), no federal issue is presented herein:

1. The federal government in its Memorandum admits that the lands in question were and are tidelands. (Memorandum, pp. 1-2.)

2. Under the laws of Mexico in effect at the time of the Mexican conveyance to Summa's predecessors in interest, tidelands were subject to a "public trust easement." This was established by Summa's expert on Mexican law through his testimony at the trial below. (Las Siete Partidas, CCH (Spain) (1931) pp. 820-821; Reporter's Transcript, p. 1084.)

3. The original Mexican grant contains a *specific, express reservation* of such public rights, and the United States' Decree of Confirmation issued by the Board of Land Commissioners as well as the decision upholding the decree rendered by the United States District Court in the confirmation proceedings incorporate this language by reference, according to the record herein. (Reporter's Transcript, p. 1085; Exh. 1, pp. 61-63, 83-84; Pet. App. A-5, p. A-58.)

4. Even if there had been no *express reservation* of "public trust" rights in the conveyance to Summa's predecessors in interest, this Court long ago decided that "trust" interests are not affected by proceedings to confirm private titles conveyed by prior sovereigns upon cession to the United States. Such interests are not required to be placed before confirmatory bodies and are not terminated by an adverse ruling of such bodies. (*Townsend v. Greeley* (1866) 72 U.S. (5 Wall.) 326; *Fremont v. United States* (1854) 58

U.S. 541; *New Orleans v. United States* (1836) 35 U.S. (10 Pet.) 662.)

5. California recognizes the underlying fee title of Summa to the subject lands in accordance with prior decisions of this Court, none of which dealt with the incidents of such ownership. (*United States v. Coronado Beach Co.* (1921) 255 U.S. 472; *Knight v. United States Land Association* (1891) 142 U.S. 161; *San Francisco v. LeRoy* (1891) 138 U.S. 656.)

6. The federal government itself recognized that the public trust servitude exists over tidelands within ranchos in one of the above-cited cases. (*United States v. Coronado Beach Co.* (1921) 255 U.S. 472, 482.)

7. The incidents stemming from private ownership of property have traditionally been defined according to state law and this Court has consistently held that no federal question is presented as to such matters. (*Los Angeles Milling Co. v. Los Angeles* (1910) 217 U.S. 217; *Devine v. Los Angeles* (1906) 202 U.S. 313; *Hooker v. Los Angeles* (1903) 188 U.S. 314.)

8. Under long-settled California law, private titles to tidelands are subject to a retained "public trust" easement. (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 606 P.2d 362, 162 Cal.Rptr. 327, cert. denied, 449 U.S. 840; *People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79; *Oakland v. Oakland Waterfront Co.* (1897) 118 Cal. 160, 50 P. 277.)

9. Nothing in the California Supreme Court's decision is violative of the Treaty of Guadalupe Hidalgo (9 Stat. 922), since the public trust rights were reserved and, in any event, the nature of Summa's private title is equal to that accorded citizens of the United States in California. (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 606

P.2d 362, 126 Cal.Rptr. 327, cert. denied, 449 U.S. 840; *People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79.) Were the position of the United States adopted, Mexican grantees would be afforded greater title interests than those accorded United States citizens, contrary to the mandate of the Treaty of Guadalupe Hidalgo. (9 Stat. 922, 929, Art. VIII.)

10. No interest of the United States is affected by this case in that it holds a similar title interest in the subject tidelands which is paramount to that of California. (*United States v. 1.58 Acres of Land, Etc.* (D. Mass. 1981) 523 F.Supp. 120, 123-125.)

DISCUSSION.

The position of the United States as set forth in its Memorandum as Amicus Curiae in this case represents, in Churchill's words, "a riddle wrapped in a mystery, inside an enigma." For in attempting to attack California's well-established common law public trust doctrine, the federal government has distorted its nature, ignored that doctrine's historic antecedents, and suggested, without support, a new and novel rule to the effect that incidents of title deraigning from Mexican grants must be treated differently from the other incidents of title that this Court has consistently held must be determined by state law. In so doing, the government has permitted philosophical predisposition to overcome considered legal judgment. Its analysis is erroneous and its conclusions are wrong.

The public trust in navigable waters is an ancient doctrine, with its roots in the Code of Justinian. Embodied in both civil and common law systems, it is observed in virtually every civilized western nation. (Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine* (1970) 79 Yale L.J. 762, 763-772.) Its ancestry in California is legitimate, for it stems both from Mexican law (Las Siete Partidas, CCH (Spain) (1931) pp. 820-821) and the common law. (*People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79.) It has been observed and enforced in California throughout the State's history, as an inherent attribute of sovereignty. (*Id.*)

This is because of the fundamental importance of the tidelands and navigable waters to the people of a state or nation. Control over these areas has been consistently characterized as an inherent attribute of sovereignty; no more subject to abdication than the police power. (*Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 453-454.) These

rights were preserved for the people under Mexican law. (Las Siete Partidas, CCH (Spain) (1931) pp. 820-821; *Apalachicola Land & Development Co. v. McRae* (1923) 86 Fla. 393, 98 So. 505, appeal dismissed, 269 U.S. 531.) Nothing in the Act of 1851 (9 Stat. 631) or the Treaty of Guadalupe Hidalgo (9 Stat. 922) suggests that a different result should be reached, and that these preexisting rights should have been extinguished by the federal confirmation process. Although a great many excesses were perpetrated in the 19th century General Land Office, it has not been suggested until now that the federal confirmatory proceedings incidentally extinguished these ancient public rights.

For these reasons, it is particularly puzzling that the federal government has taken the position that these rights were somehow revoked with respect to tidelands that, by accident of history, were granted under Mexican rule and subsequently confirmed by a federal patent.

The principles set forth in the decision below are so clear and innocuous as to defy suspicion:

1. The lands in question are, as the government observes (Memorandum, pp. 1, 8 n. 4), clearly tidelands.

2. The federal government held tidelands in trust for the future state. When California was admitted into the Union, it assumed whatever rights were retained by the United States, as an incident of sovereignty. (*Barney v. Keokuk* (1876) 94 U.S. 324; *Shively v. Bowlby* (1894) 152 U.S. 1.)

3. The universal assumption, under both state and federal law, is that grants by the government (federal or state) do not convey interests held in its sovereign capacity; and all such grants are construed strictly against the grantee and in favor of the people in whose interest they are held. (*United States v. California* (1947) 332 U.S. 19.)

4. A federal patent conveyed under the Act of 1851 merely confirmed to the private title holder whatever interests were received from Mexico. (*Boquillas Cattle Co. v. Curtis* (1909) 213 U.S. 339.)

These principles, applied to the tidelands of Ballona Lagoon, compel the conclusion that nothing in either state or federal law conferred upon these title holders an estate superior to that enjoyed by every other littoral owner on the California coast. For there are many thousands of acres of tidelands once owned by the State that have been conveyed into private ownership, yet by operation of law are still subject to the public trust. (*People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79.) Petitioner's property would simply fall into this category of land. Thus, contrary to the contention of the United States (Memorandum, p. 7), the State is not trying to treat privately owned tidelands as if they were owned by the State; rather the State is trying to treat petitioner the same as all other private property owners of tidelands within the State.[1]

Such a policy is within the *State's* prerogative, since, as this Court has repeatedly held, a confirmatory patent is not an independent source of title subject to interpretation under federal law. (*Boquillas Cattle Co. v. Curtis* (1909) 213 U.S. 339; *Adam v. Norris* (1880) 103 U.S. 591.) The basic error in the government's analysis is its failure to follow this precedent, determining on its own that the rule enunciated

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[1]Apparently unbeknownst to the United States (Memorandum, p. 7), California does own navigable water bottoms and tidelands south of Sonoma. Although Mexican rancho grants were generally located south of this city, even the California Land Title Association (CLTA) acknowledges that tidelands and navigable waterways were rarely included in such grants. (CLTA Brief, p. 4.) Thus CLTA's adversarial hyperbole that title to over 8½ million acres of land included in rancho grants is clouded by this case, a charge evidently believed by the United States (Memorandum, pp. 11-12), has no basis in fact.

in *Borax, Ltd. v. Los Angeles* (1935) 296 U.S. 10, a case requiring federal law to govern federal patents of public lands of the United States, ought to apply in the case of confirmatory patents as well. We submit that the government cannot substitute its judgment for that of this Court.

So too is the government's characterization of the riparian rights and pueblo water rights issues in *Los Angeles Milling Co. v. Los Angeles* (1910) 217 U.S. 217; *Devine v. Los Angeles* (1906) 202 U.S. 313; and *Hooker v. Los Angeles* (1903) 188 U.S. 314, as being distinct from issues relating to "fullness of title" an attempt to avoid well-settled precedent established by this Court. (Memorandum, p. 5.) Indeed, the government has fashioned this "fullness of title" distinction out of whole cloth, for whether a riparian ownership extends to the river's high water mark or to mid-channel relates to "fullness of title"; likewise, a riparian farmer would consider his inability to divert river waters because of the existence of paramount pueblo water rights as relating to "fullness of title."[2] Yet both of these issues have been left to State determination. (*Los Angeles Milling Co. v. Los Angeles* (1910) 217 U.S. 217; *Devine v. Los Angeles* (1906) 202 U.S. 313; *Hooker v. Los Angeles* (1903) 188 U.S. 314; *Hardin v. Jordan* (1891) 140 U.S. 371.) The public trust must be treated no differently from these other incidents of title; state law should govern here as well.

The government asserts that the holding below, by preserving the public trust rights of the public in the tidelands, violates the promise given in the Treaty of Guadalupe Hi-

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[2]Riparian rights are inseparably annexed to the soil and pass with it as a parcel of the land. (*Lux v. Haggin* (1886) 69 Cal. 255, 391.)

Pueblo water rights are a species of property in the water of streams within a pueblo's boundaries. Pueblos have title to such waters, subject to the public trust of distributing the water in just proportion. (*Vernon I. Co. v. Los Angeles* (1895) 106 Cal. 237, 248-249.)

dalgo that vested property rights would be "inviolably respected." (Memorandum, p. 9.) We believe the decision has just the opposite effect. By preserving public rights in public waters that existed under Mexican and Anglo-Saxon common law alike, that decision carries out the Treaty's mandate. The government's fallacy lies in an inexplicable and niggardly notion that the people are incapable of holding property rights; that such rights can exist only in private entities. Furthermore, in the instant case, the predecessors to the private entity involved herein expressly took title to the land subject to these public rights. (Exh. 1, pp. 20-22, Grant for Rancho La Ballona; Pet. App. A-1, p. A-9.) Thus recognition of this title is nothing more than a demonstration of inviolable respect for the title petitioner received.

It is plain that the United States has no respect for the public trust and fails to understand it. In describing the doctrine as "voracious"[3] and concluding that the servitude "wholly dispossesses" a property owner of all the benefits of his land (Memorandum, pp. 6-7), the United States reveals its feelings about the doctrine, but neglects to mention two important limitations prescribed by the California court: The existence of the public trust on privately owned lands does not deprive the owner of economic use of his lands. An owner of the lands subject to the public trust ". . . may use the property as he sees fit, subject to the power of the State to abate any nuisance he may create thereon, and to

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[3]The California court's decisions in *Lyon* and *Fogerty* do not, as the United States suggests (Memorandum, p. 6 n. 2), "extend" the public trust doctrine to nontidal, navigable waters. As those opinions amply show, the better (and majority) rule in this country has always been that this doctrine has always been applicable to such waters. (*State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, 625 P.2d 256, 172 Cal.Rptr. 713, cert. denied, 454 U.S. 865; *State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, 625 P.2d 239, 172 Cal.Rptr. 696, cert. denied, 454 U.S. 865.)

remove any purpresture he may erect thereon." Furthermore, where improvements have been constructed on such lands the State may not exercise the trust without compensating the owner. (*People v. California Fish Co.* (1913) 166 Cal. 576, 599, 138 P. 79, 88; Calif. Pub. Res. Code § 6312.)

Uses consistent with the public trust have been held to include mineral exploration (*Boone v. Kingsbury* (1928) 206 Cal. 148, 181-184, 273 P. 797, 811-813, appeal dismissed and cert. denied, 280 U.S. 517) and the construction of docks, wharves, motels, restaurants, shopping complexes and parking areas. (*Martin v. Smith* (1960) 184 Cal.App.2d 571, 577-578, 7 Cal.Rptr. 725, 728.) Petitioner is free to pursue its reasonable investment expectations by submitting development plans to appropriate officials. It is thus not true that the existence of the public trust "effectively recaptures" fee ownership of petitioner's land as the United States asserts. (Memorandum, p. 8.) Thousands of acres of other tidelands in private ownership in the State have already been successfully developed although subject to the trust. It is misleading and not true for the government to insinuate that these purchasers for value received nothing for their money.

In making these statements, the government mistakenly presumes that the State is "free to retain whatever easement it deems appropriate" when it relinquishes to the riparian or littoral owner its title to tidelands or banks below high water mark. (Memorandum, p. 7.) But this Court has held that the public trust may not be alienated or extinguished through alienation of the underlying fee. (*Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387; see also *People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79.)

It is this understanding of the special quality of the public trust and the recognition that other governments have similar doctrines that led to this Court's holding in *New Orleans*

v. United States (1836) 35 U.S. (10 Pet.) 662, that trust interests survive a change in sovereignty. In *New Orleans*, the United States claimed that certain lands in the City of New Orleans had passed to it by the cession of Louisiana to the United States, that the City of New Orleans was asserting ownership of these lands, and that the city should be permanently enjoined from invading the dominion of the United States over this land. (35 U.S. at 711.)

The City of New Orleans claimed that while under the sovereignty of Spain and France this land had been dedicated by these former sovereigns for public use as quays and that this dedication survived the change in sovereignty. (35 U.S. at 711-712.)

This Court's first inquiry was as to whether the prior sovereigns could have impressed this property with public rights. The Court stated:

> "As the rights claimed by the city had their origin under the laws of France, and were enjoyed for nearly forty years under the laws of Spain, it becomes necessary to examine those laws, to ascertain the nature and extent of these rights." (35 U.S. at 718.)

This Court concluded that such public rights in property as claimed by New Orleans did exist under both sovereignties. (35 U.S. at 730-731.)

Next the Court noted that the city had presented its claims to the Board of Land Commissioners formed pursuant to the Act of March 2, 1805, "an act for ascertaining and adjusting the titles and claims to land, within the territory of Orleans, and the district of Louisiana," and the Board had rejected the claim. (35 U.S. at 733-734.)

Nevertheless, this Court held that because the prior sovereign had held the land in trust for the city, the land had not passed to the United States by the treaty of cession as

"public lands of the United States." Neither had the public rights been extinguished through the confirmation proceedings. Rather, these rights had survived the change in sovereignty, had survived the confirmatory proceedings, and were now held by the State. (35 U.S. at 736-737.) In the words of this Court:

> "The state of Louisiana was admitted into the Union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence, no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities. All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people." (35 U.S. at 737.)

The government's analysis of this case (Memorandum, pp. 9-10 n. 5), thus misses the point.

The government correctly states that in *Eldridge v. Trezevant* (1896) 160 U.S. 452, Louisiana recognized a public rights servitude arising under a prior sovereign by incorporating it into the Civil Code of Louisiana. (Memorandum, p. 10 n. 5.) But, again the government misses the point. This recognition of preexisting public rights, approved by this Court, exactly parallels the instant situation. If in *Eldridge* the public rights had not predated the private ownership, would not the codification of these public rights on private property have amounted to a taking? It is precisely because the public rights survived the change in sovereignty and survived the confirmatory proceedings that Louisiana was able to recognize these rights and apply them to grantees of France and Spain (confirmatory patentees) as well as

federal patentees such as Mr. Eldridge. Louisiana's recognition happened to take the form of a statute. In California, the recognition of the public rights in ranchos simply took the form of case law, but this Court's conclusion still obtains:

> "[T]he provisions of the Fourteenth Amendment [do not] extend to and override public rights, existing in the form of servitudes or easements, held by the courts of a State to be valid under the constitution and laws of such State." (160 U.S. at 468.)

While on the one hand the government gives short shrift to the above cases expressly upholding public servitudes arising under a prior sovereign, stating that the issuance of the patent "ends the matter" (Memorandum, p. 9), it apparently has deemed it unnecessary to cite any authority for the proposition that the federal navigational servitude survived the issuance of the patent. (Memorandum, pp. 10-11.)

The government quite simply states that the patent to petitioner's predecessors did reserve the federal navigational servitude. (Memorandum, pp. 10-11.) If the patent did so, it did so *silently* because there was no express reservation of this interest. On the other hand, the government states that *no* interest passed to California (Memorandum, pp. 9, 11) on the basis that the patent contained no express reservation of any state interest.[4] It is clear that while the government desires to blanket private property owners with protection from state interference, it is not willing to go so far as to protect private interests from the exercise of its

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[4]While the confirmatory patent was silent on this issue, the original Mexican grant expressly reserved public rights within the rancho. (Exh. 1, Grant for Rancho La Ballona.) This reservation was not only broad enough to reserve the State's public trust servitude, but the federal navigational servitude as well.

own servitude. Yet if the federal servitude survived the patent, it is because this interest is guaranteed by the U.S. Constitution, not because the patent reserved it. Although the government acknowledges that the sovereign public trust interest would have passed to the State through the Equal Footing Doctrine (Memorandum, pp. 10-11), also guaranteed by the U.S. Constitution, the government refuses to admit that it too would have survived. The government's conclusion seems to have guided its analysis.

The final mystery of the federal brief lies in its concession that there is no great federal interest in this case on the basis of its effect on federal land, yet it couples this concession with dark hints that military or other reservations will be subjected to "pervasive control by the State invoking its 'public trust' rights." (Memorandum, p. 13.) Neither public trust rights or any other state sovereign prerogatives have withstood the overriding powers of the federal government acting to impose its navigational servitude under the commerce clause, or to legislate for federal enclaves. (See, *e.g.*, *Kleppe v. New Mexico* (1976) 426 U.S. 529; *United States v. Rands* (1967) 389 U.S. 121; *United States v. Willow River Co.* (1945) 324 U.S. 499.)

More importantly, in our system of dual sovereignty, the federal government itself is administrator of the trust. (*United States v. 1.58 Acres of Land, Etc.* (D. Mass. 1981) 523 F.Supp. 120, 123.) And the State's administration of the public trust is subject to the paramount rights of the federal government to administer its trust with respect to matters within its powers. (*Id.*) Thus, it is most surprising that the United States would fear the existence of a "pervasive public trust."

CONCLUSION.

Even before the adoption of the Erie doctrine, federal common law was not applied to state real property cases. (*Swift v. Tyson* (1842) 41 U.S. (16 Pet.) 1, 18-19; *Wilcox v. Jackson* (1839) 38 U.S. (13 Pet.) 498, 517.) The interest of the United States at this late date in changing this rule is supported neither by precedent nor a respect for a healthy federal system. The entire California coastline is, as it should be, subject to the same rules of state law. This rule is neither unusual nor novel. What is unusual is the willingness of the federal government to impose a policy preference under the guise of federal constitutional doctrine. No basis exists for the Court's jurisdiction here.

DATED: March 7, 1983.

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No. 82-708

IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

The Treaty of Guadalupe Hidalgo, ending the Mexican-American War and ceding California to the United States, required that the property rights of former Mexican citizens in the acquired territory "shall be inviolably respected." In keeping with the United States' commitment under the treaty, Congress passed the Act of March 3, 1851 "to ascertain and settle the private Land Claims in the State of California." Under the 1851 Act, an 1839 Mexican grant to petitioner's predecessors was confirmed as valid, and a federal patent issued without qualification or reservation. The court below, however, held that California, upon admission to the Union, had obtained from the United States an expansive "public trust" property interest in the Mexican grant land. This purported state interest would preclude virtually all uses by petitioner of the shallow wetlands involved. In these circumstances, the questions presented are:

1. When the United States pursuant to its treaty obligation confirmed a Mexican land grant and patented the land to private parties without qualification, did it silently reserve a "public trust" property interest, to which the State of California succeeded?

2. After a factual determination has been made in an 1851 Act patent proceeding that the Mexican grant land was not tidelands, may the State of California collaterally attack that finding?[1]

---

[1] In the California Supreme Court, this case was entitled *City of Los Angeles v. Venice Peninsula Properties.* The suit was instituted by the City of Los Angeles against Ethel Fraser Carmen-Ryles; Robert D. Byrne and Byrne C. Manson, as Trustees under the Will of Olive Byrne Jones, Deceased; Fraser's Million Dollar Pier Company; United California Bank, as Trustee under the Will of Herbert Richmond Gage; Ruth Jones Wright; Hughes Tool Company (now Summa Corporation); the State of California and one thousand Doe defendants. Southern California Gas Company was added as defendant Doe 1. Venice Peninsula Properties succeeded to the interests of Ethel Fraser Carmen-Ryles, Fraser's Million Dollar Pier Company and United California Bank and was substituted as the first-named defendant

below. The State of California was named as a defendant because of a provision of California law that makes the State a necessary party to any action by a city involving "the title to or boundary of tidelands." Cal. Pub. Res. Code § 6308. The City claimed to be the present owner of a "public trust" easement in petitioner's property. The State supported the City's claim, and filed a cross-complaint against the other defendants alleging that the State had owned a "public trust" interest in the property, which it had granted to the City. All of the defendants except Southern California Gas Company stipulated to be bound by the outcome of the litigation between respondents and Summa Corporation. As a result, they did not actively participate in the proceedings below. Southern California Gas Company, the owner of a pipeline easement across petitioner's land, no longer has an interest in the outcome of this proceeding because of the concession by respondents that the company would be entitled to compensation for any damage to its facilities resulting from any exercise of the State's "public trust" rights.

Petitioner Summa Corporation is part of a privately held interconnected network of corporations, the whole of which is owned 100 percent by the Estate of Howard R. Hughes. Neither Summa Corporation nor its parent, subsidiary, or affiliated companies has any shareholder other than the Estate of Howard R. Hughes and other affiliated corporations, which are ultimately owned 100 percent by the Estate of Howard R. Hughes.

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No. 82-708

IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion (and dissents) of the Supreme Court of California to which the writ is addressed, affirming the trial court, appears at 31 Cal. 3d 288, 182 Cal. Rptr. 599, 644 P.2d 792 (1982). The opinion (and dissent) of the state Court of Appeal, reversing the trial court, appears at 172 Cal. Rptr. 619 (1981). That opinion was superceded when the California Supreme Court granted a hearing, and was not published in the official report. *See* Cal. Rules of Court, Rule 976(d) (1972). The findings of fact and conclusions of law of the state trial court, entered on February 22, 1977, and the judgment it entered on October 11, 1977, are unreported. All of these opinions and orders are reproduced in the Appendix to the petition for certiorari.

JURISDICTION

The opinion of the California Supreme Court was entered on May 10, 1982. A timely petition for rehearing was filed, and was denied on June 16, 1982. By order of August 26, 1982, petitioner's time to file a petition for a writ of certiorari was extended to October 22, 1982, and the petition was filed on that date. On March 21, 1983, this Court granted the petition for certiorari, and on April 14, 1983, petitioner's time to file its brief on the merits was extended to June 6, 1983. This Court has jurisdiction under 28 U.S.C. § 1257(3).

TREATY AND STATUTE INVOLVED

Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848).

Act of March 3, 1851 "to ascertain and settle the private Land Claims in the State of California," 9 Stat. 631 (1851).

The Treaty and the Act of 1851 are reproduced in the Appendix to the petition for certiorari.

STATEMENT OF THE CASE

A. The Property In Dispute And The Origin Of Petitioner's Title.

The property in issue is a shallow and narrow body of water, known as Ballona Lagoon, located in the Marina del Rey area of Los Angeles, California, an area "largely, or entirely, under urban development."[2] (R.T. 286.)[3] Ballona Lagoon lies generally parallel to and approximately 300 yards inland from the shore of the Pacific

[2] Appended hereto is a contemporary map of this area on which the State Lands Commission's line designating "where the public trust may exist" has been superimposed. Ballona Lagoon is labelled and shown in blue just to the left of the center of this map.

[3] "R.T." refers to the Reporter's Transcript on Appeal of the trial proceedings; "Pl. Ex." and "D. Ex." to the exhibits introduced into evidence at trial by plaintiffs and defendants, respectively; "C.T." to the Clerk's Transcript on Appeal in the state court; "P.A." to the Appendix to the petition for writ of certiorari; and "J.A." to the Joint Appendix filed herewith.

Ocean; it is separated from the ocean by a barrier beach.[4] (Pl. Ex. 74; R.T. 729, 784.) As a result of governmental condemnations in 1940 and 1959, the lagoon is bisected both by a flood control channel and by a dredged entry channel connecting the nearby Marina del Rey harbor with the Pacific Ocean. (D. Exs. E & G; R.T. 850-877.)

These projects have left a very small pond or lagoon remnant on the southerly side and a somewhat larger one on the northerly side (Ballona Lagoon). The latter, which constitutes the property in issue,[5] was placed in flowage communication with the Marina del Rey harbor entry channel as part of the construction of that project in the early 1960's. The communication takes place by means of a pipe connected to a motorized tide gate. (C.T. 564, 778, 796.) The Ballona Lagoon remnant is approximately 1,500 yards long, 25 yards wide, and at mean high tide the water is one to six feet deep.[6] (R.T. 628-630; Pl. Ex. 66; R.T. 617, 660; Pl. Ex. 74; R.T. 729, 784.) At low tide it is virtually dry. (R.T. 662.)

Petitioner's title, like that to all the land in the Marina del Rey area, is derived from an 1839 Mexican grant of "Rancho La Ballona" to Agustin and Ignacio Machado

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[4] The contemporary Ballona Lagoon is part of the remains of a larger wetlands and marsh area also sometimes referred to on older maps as Ballona Lagoon. *See, e.g.*, 1887 United States Coast and Geodetic Survey map, Pl. Ex. 14. (J.A. 123.)

[5] Petitioner owns one of the two lots which together constitute Ballona Lagoon. The owners of the second lot were also named as defendants below, but by stipulation agreed to be bound by the outcome of the litigation against petitioner. *See* note 1, *supra*. *See also* P.A. A67.

[6] It was admitted at trial (C.T. 986) that the waters are not navigable in commerce, which is the federal test of navigability for Equal Footing purposes, *United States v. Oregon*, 295 U.S. 1, 14-15 (1935), and that they are not navigable in interstate commerce, which is the federal test of navigability for the Commerce Clause servitude. *Kaiser Aetna v. United States*, 444 U.S. 164, 178-179 (1979). The trial court found that at high tide the waters within the lagoon are navigable by "rowboats, canoes, surfboards and other shallow-draft craft" (P.A. A52), but this limited navigability may be the result of the dredging of the Marina del Rey entry channel and the installation of the motorized tidegates. Significantly, there was no finding that the land was navigable, even by recreational craft, at the time of California's statehood.

and Felipe and Tomas Talamantes, citizens of Mexico.[7] (J.A. 4-6). Armed conflict between Mexico and the United States began early in 1846. The conquest of California was virtually complete on July 7, 1846, when Monterey was occupied, and all fighting ended with the fall of Mexico City to American troops on September 14, 1847. The Treaty of Guadalupe Hidalgo, signed on February 2, 1848 and ratified by the Senate on May 10, 1848, marked the formal end of the state of war between the United States and Mexico.

As part of the peace treaty, Mexico ceded California to the United States. (Art. V; P.A. A93-A94.) In return, the United States agreed that the property rights of Mexicans in the newly-acquired territory "shall be inviolably respected." (Art. VIII; P.A. A96.) In accordance with the treaty obligation, on March 3, 1851 Congress passed "An Act to ascertain and settle the private Land Claims in the State of California," whose purpose was to determine conclusively what was private property and thus not part of the public domain belonging to the United States upon the cession. (P.A. App. B-2.) The Act established a board which, by applying the "laws, usages, and customs" of Mexico (§ 11; P.A. A111), was to decide upon the validity of claims to land derived from that country.

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[7] The Mexican title documents show the steps taken in granting Rancho La Ballona. (J.A. 1-6.) The Machados and Talamantes petitioned the Governor of the Department of the Californias for the grant in 1839, eighteen or nineteen years after they first took possession of the Rancho. (J.A. 1.) The request was referred to the committee on unoccupied lands of the City Council of Los Angeles to determine if the land "was vacant, and could be granted without injury to third persons or the public. . . ." S. Ex. Doc. No. 18, 31st Cong., 2d Sess. 3 (1851). (*See also* J.A. 213.) The committee reported that "they find no obstacle" to the grant. (J.A. 2.)

The judicial possession, "the judicial proceeding of walking the boundaries" (J.A. 213), was completed on December 31, 1839. (J.A. 8-11.) It established the "sea-coast" as one of the boundaries of Rancho La Ballona. (J.A. 11.) According to Señor Laffan, the Mexican law expert, the judicial possession for Rancho La Ballona was performed in complete accord with governing Mexican Law. (J.A. 214, 217, 219.) The judicial possession was conclusive under Mexican law and upon the United States. *United States v. Pico*, 72 U.S. (5 Wall.) 536, 539 (1866).

On October 2, 1852, the Mexican grantees of Rancho La Ballona filed a petition for confirmation of their title under the Act of 1851. (J.A. 19-20.) After hearing, the petition was granted by the Board of Land Commissioners in 1854 (J.A. 21) and affirmed by the United States District Court on appeal in 1855. (J.A. 22-33.) In accordance with the 1851 Act, a survey of the confirmed claim was prepared in 1858, approved by the Surveyor General of California, and submitted to the General Land Office of the United States Department of the Interior for issuance of a patent. (J.A. 26.)

The survey thus submitted established the shore of the Pacific Ocean as one boundary of the Rancho. (J.A. 26.) The General Land Office, however, declined to approve the survey, noting that it included within the Rancho an area just inland from the ocean which was labeled "inner bay." The Land Office remanded the survey to the Surveyor General with directions that "unless good cause be shown to the contrary," the survey be amended to substitute the landward shore of the "inner bay" as the boundary instead of the shore of the ocean. (J.A. 32-34.) The survey of Rancho La Ballona was subsequently published twice (*see* J.A. 35, 37), and a protest against La Ballona's ocean and northern boundaries was filed in 1869 by the claimants of the rancho to the north. (J.A. 39-49.)

In the proceedings that followed, the Mexican grantees of Rancho La Ballona presented affidavits that the "inner bay" was not an "arm of the sea" but rather pasture land intermittently overflowed with fresh water in times of storms when sand blocked an adjacent creek's outlet to the ocean. (J.A. 55, 58, 60.) Based upon this submission, as well as the survey field notes and the underlying Mexican *diseño* (map),[8] the General Land Office ultimately determined that the "inner bay" was not an arm of the sea and withdrew its earlier objection to the survey's ocean boundary. (J.A. 84-94.) The survey was thereafter approved by the Secretary of the Interior (J.A. 100), and in 1873 a patent issued confirming title

[8] The *diseño* appears at J.A. 7.

to the rancho, including the "inner bay," in the Mexican grantees (J.A. 101-109.)

At no time during the 1851 Act proceedings was it asserted that California or anyone other than the Machados and Talamantes owned any interest in Rancho La Ballona, and the patent reserved no such interest.

B. Parties And Proceedings Below.

This action was commenced in the Los Angeles County Superior Court on September 13, 1965, when the City of Los Angeles filed a Complaint for Declaratory Relief and to Quiet Title to two parcels of land which together constitute the larger lagoon remnant of "Ballona Lagoon." (C.T. 1-14.) Named as defendants were all of the individuals and entities then having an interest of record in either parcel.[9]

The City alleged that it was the owner of a "public trust" interest in the property. It claimed to be the grantee of the State of California,[10] which allegedly received the interest on statehood "by virtue of its sovereignty." (C.T. 4.) The State subsequently filed a cross-complaint supporting and reiterating the City's allegations. (C.T. 115-120.)

At the time of filing its Complaint, the City sought to establish the "public trust" interest in order to avoid paying just compensation for dredging the property as part of the then-contemplated construction of a small craft waterway system in some adjacent decaying canals. (C.T. 5; D. Exs. N-2, N-3, N-14; R.T. 907, 920, 933.) However, by the time of trial almost ten years later, that project had been abandoned. Accordingly, the City's purpose

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[9] These parties are identified in note 1, *supra*.

[10] By Chapter 77, Statutes of California, 1917, all interest held by the State of California, by virtue of its sovereignty, in tidelands within the boundaries of the City of Venice, a predecessor of the City of Los Angeles, was granted to the City. The Statute, however, contains the express proviso "that nothing contained herein shall in any way affect any property held or claimed under, through or from a Mexican grant or patent therefor. . . ." This proviso reflected the common understanding that areas within Mexican grants were excluded from the property received by California upon its admission to the Union. *See* pp. 9-10, *infra*.

in seeking the "public trust" decree at trial was to establish public access to petitioner's land and to require its preservation as open space. (C.T. 448, 796.)

Following a bench trial, on November 18, 1975, the trial court announced its intended decision in favor of petitioner and against the City and the State on every claim, including the asserted "public trust" interest. (C.T. 477-479.) Seven months later, the trial court "informally" stated that it intended to vacate its prior notice of intended decision (C.T. 485), and on October 19, 1976, issued a "revised" notice of intended decision in favor of the City and the State. (C.T. 492-494.)

Thereafter, the trial court entered findings of fact which found that the property had been a tidal "arm of the Pacific Ocean" at all relevant times. (P.A. A52.) Although the trial court found that title to the property had been confirmed in petitioner's predecessors under the Act of 1851 (P.A. A58), it further found that under Mexican law the original grantees had not obtained any property interest in the land.[11] (P.A. A54.) The trial court entered judgment on October 11, 1977, decreeing the land subject to a "trust" easement held by the State of California "for the People of the State."[12] (P.A. A68.)

On petitioner's appeal, the judgment was reversed by the Court of Appeal, California's intermediate appellate court, on March 25, 1981. (P.A. App. A-4.) With one judge dissenting, the Court of Appeal found that the

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[11] The trial court's finding that under Mexican law petitioner's predecessors had no property interest in the land is so far out of line with the controlling decisions of this Court (*see* p. 15 & note 23, *infra*) that on appeal the State did not urge that position and the state supreme court did not adopt it.

[12] The trial court judgment also awarded the City several easements under various state law theories of express and implied dedication. (P.A. A68-A69.) The California Supreme Court did not reach that part of the judgment, finding that the uses which such easements supported were "included within the public trust." (P.A. A16; 31 Cal. 3d at 203, 182 Cal. Rptr. at 608, 644 P.2d at 801.) Since the California Supreme Court decided the case on federal grounds, this Court has jurisdiction without regard to any state grounds which were not reached. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938).

"public trust" doctrine was applicable only to those lands to which the State of California had once held title. (P.A. A40.) Relying on the decisions of this Court, it held that California had not, on statehood, succeeded to any property interest in lands subject to previous Mexican grants, and that the federal patent issued to petitioner's predecessors was conclusive of California's claim. (P.A. A42-A44.)

The California Supreme Court granted a hearing in the case on May 21, 1981, thus superceding the decision of the Court of Appeal. *See* Cal. Rules of Court, Rule 976(d) (1972). By a decision filed on May 10, 1982, it affirmed the trial court's "public trust" decree. The supreme court believed that the "inner bay" depicted on the United States patent survey was an "arm of the Pacific Ocean" which had continually existed as such for more than 900 years; it therefore held that the presently existing "Ballona Lagoon" was tidelands at the time California entered the Union. (P.A. A7 & note 6.)[13]

The supreme court reached the conclusion that petitioner's land is burdened with a "public trust" interest by holding that Mexico had impliedly reserved such an interest in the property (P.A. A8-A9),[14] that this interest had passed to the United States on Mexico's cession of California (P.A. A9-A10),[15] that the United States had silently reserved that interest from its 1851 Act patent to petitioner's predecessors (P.A. A15),[16] and that on admission to the Union, California succeeded to the United States' reserved interest as an incident of sovereignty. (P.A. A15.)[17] Two justices filed separate dissents from the four-justice majority opinion. (P.A.

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[13] 31 Cal. 3d at 296, 182 Cal. Rptr. at 604, 644 P.2d at 796-797. The California Supreme Court decision appears in Appendix A-1 to the petition for certiorari. All citations will be to the appendix with footnotes supplying the parallel citations to the published reports.

[14] 31 Cal. 3d at 297, 182 Cal. Rptr. at 604-605, 644 P.2d at 797-798.

[15] *Id.* at 297-298, 182 Cal. Rptr. at 605, 644 P.2d at 798.

[16] *Id.* at 302, 182 Cal. Rptr. at 608, 644 P.2d at 801.

[17] *Id.*

A16, A30.)[18] The court denied petitioner's request for rehearing on June 16, 1982. (P.A. A33.) This Court granted the petition for certiorari on March 21, 1983.

C. The Equal Footing Doctrine And Mexican Land Grants.

While the Mexican grantees of Rancho La Ballona were in quiet possession of the Rancho, on September 9, 1850, California was admitted into the Union "on an equal footing with the original States in all respects whatever." 9 Stat. 452 (1850). With this Court's earlier decision in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), it had become settled that by reason of its sovereignty each newly admitted state was entitled to fee simple ownership of the beds of its tidal waters under the Equal Footing Doctrine. *See also Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65-66 (1873).

In the case of California, however, the United States had a paramount duty under the Treaty of Guadalupe Hidalgo to protect the property rights of former Mexican citizens. Accordingly, it soon became established law that the right of California to ownership of its tidelands was subordinate to the rights of prior Mexican grantees of tidelands, and that tidelands subject to such grants did not pass to the State under the Equal Footing Doctrine. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977) ("Where Mexico had patented tidal lands to a private owner before ceding to the United States the territory which ultimately became the State of California, California did not succeed to the ownership of such lands upon her admission to the Union"); *United States v. Coronado Beach Co.*, 255 U.S. 472, 487-488 (1921); *Knight v. United States Land Association*, 142 U.S. 161, 183-184 (1891).

Even before this Court enunciated the principle — and while the confirmation proceedings for Rancho La Ballona were still underway — the California Supreme Court

[18] *Id.* at 303, 315, 182 Cal. Rptr. at 608, 616, 644 P.2d at 801, 809.

declared in 1867 that no interest in private Mexican grant lands passed to the State under the Equal Footing Doctrine. *Ward v. Mulford*, 32 Cal. 365, 371-372 (1867). *See also Teschemacher v. Thompson*, 18 Cal. 11, 27-28 (1861).

D. California's "Public Trust" Property Interest.

California determined early on that her title to Equal Footing tidelands was held in trust for the people of the State for purposes of commerce, navigation and fishing. *See Eldridge v. Cowell*, 4 Cal. 80, 87-88 (1854). Notwithstanding this court-imposed trust, the California legislature enacted a number of statutes providing for extensive sales of publicly owned tidelands during the early years of statehood. Up until 1913 the state supreme court held that such tideland sales either passed absolute title, *e.g.*, *Friedman v. Nelson*, 53 Cal. 589 (1879); *Holladay v. Frisbie*, 15 Cal. 634 (1860); *Eldridge v. Cowell, supra*, or no title. *E.g.*, *Kimball v. MacPherson*, 46 Cal. 103 (1873) (sale made without regard to any trust purpose); *Taylor v. Underhill*, 40 Cal. 471 (1871); *People v. Morrill*, 26 Cal. 336 (1864).

People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913), made a break with past California law. Although asked to declare certain tideland sales void, the California Supreme Court held instead that such sales conveyed fee title to the land, but did not convey the State's "public trust" interest. Thus, the private owner received only "naked title to the soil." *Id.* at 598, 138 P. at 88. Through its "public trust" interest, the State was held to have retained the right "to enter upon and possess" the land, to make "changes and improvements" for "the preservation and advancement of the public uses," *id.* at 599, 138 P. at 88, and to afford the public the "right of free access." *Id.* at 589, 138 P. at 84.

From its inception in *California Fish Co.*, the "public trust" doctrine has been aggressively enlarged by decisions of the California Supreme Court, culminating in the case now under review. The "public trust" property interest is held to exist by virtue, not of the present

condition of the land, but its historical character as tidelands in 1850 when California was admitted to the Union. *Newcomb v. City of Newport Beach*, 7 Cal. 2d 393, 399, 60 P.2d 825, 829 (1936); Parker, *History, Politics and the Law of the California Tidelands Trust*, 4 WEST ST. U.L. REV. 149, 152 (1977). Moreover, it is said to persist despite the lawful reclamation and filling of the lands so that they are no longer tidelands. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 486-487, 91 Cal. Rptr. 23, 40, 476 P.2d 423, 440 (1970); *Atwood v. Hammond*, 4 Cal. 2d 31, 41, 48 P.2d 20, 24 (1935).[19]

Although initially expressed in terms of commerce, navigation and fishing, the permissible uses of the state's retained "public trust" interest have been vastly expanded by the California Supreme Court in recent years. Approved "public trust" uses include the preservation of the land as "open space," *Marks v. Whitney*, 6 Cal. 3d 251, 259-260, 98 Cal. Rptr. 790, 796, 491 P.2d 374, 380 (1971), the construction of a YMCA building, *People v. City of Long Beach*, 51 Cal. 2d 875, 338 P.2d 177 (1959), and drilling for oil.[20] *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928).

The power of the State in administering this broad "public trust" has been termed "absolute." *Marks v. Whitney, supra*, 6 Cal. 3d at 260, 98 Cal. Rptr. at 796, 491 P.2d at 380. It includes the right "to enter upon and possess," *People v. California Fish Co., supra*, 166

[19] The "public trust" interest is distinct from and broader than the public right to traverse and fish navigable waters covering privately owned lands so long as the waters remain navigable. *See Bohn v. Albertson*, 107 Cal. App. 2d 738, 741, 238 P.2d 128, 131 (1951). This public right in navigable waters exists without regard to the character of the land at the time of statehood and, reflecting the lack of any state property interest, the public's rights in this respect automatically terminate on the land's loss of its navigable character. *Id.* at 757, 238 P.2d at 140.

[20] By contrast, the federal navigational servitude, "which exists by virtue of the Commerce Clause in navigable streams," only "gives rise to an authority in the Government to see that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce." *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979).

Cal. at 599, 138 P. at 88, and to make physical changes to the property, *Newcomb v. City of Newport Beach, supra*, 7 Cal. 2d at 401, 60 P.2d at 829, and to determine, to the exclusion of the private owner, what use will be made of the land. Taylor, *Patented Tidelands: A Naked Fee?* 47 CAL. ST. B.J. 420, 485-486 (1972). Conversely, the private owner cannot restrain members of the public from "lawfully asserting or exercising public trust rights on these privately owned tidelands." *Marks v. Whitney, supra*, 6 Cal. 3d at 261, 98 Cal. Rptr. at 796-797, 491 P.2d at 380-381.

Thus, the "public trust" interest which the state court has now purported to extend to Mexican grant lands is a permanent estate in land. It is not dependent upon the present condition of the land, but upon the theory that it was received by California on statehood under the Equal Footing Doctrine. It accordingly permits the State to utilize non-navigable and even dry land to the exclusion of the "fee" owner.

SUMMARY OF ARGUMENT

1. The Treaty of Guadalupe Hidalgo required that the property rights of former Mexican citizens in California "shall be inviolably respected." In the Act of March 3, 1851, the United States established a Board of Land Commissioners to carry out its treaty obligation. The Act directed the Board to apply the "laws, usages, and customs" of Mexico. The legislative history shows that the 1851 Act procedure was intended to provide a conclusive determination of what was the private property of former Mexican grantees and not part of the public domain.

The title of the former Mexican grantees of the property in question here was confirmed by the Board of Land Commissioners in 1854. The required survey of the property was finally approved by the General Land Office and the Secretary of the Interior in 1873, and the patent issued that year without reservation or qualification.

More than a century later, the California Supreme Court has purported to overturn property rights thought

to have been firmly settled under the 1851 Act procedure. While it recognized that petitioner's title to the property could not be dislodged, the court achieved virtually the same result by simply carving out a concurrent property interest which it denominated a "public trust" easement. The State's asserted "public trust" easement is an expansive and permanent property interest which extinguishes fundamental aspects of private ownership. It gives the State the right to possession, to develop or not develop the land, and to control access or (as in this case) to require that the property be preserved as "open space."

California's effort to carve out this "public trust" property interest (which it claims the United States received from Mexico and passed to the State under the Equal Footing Doctrine) is incompatible with the purposes of the Treaty of Guadalupe Hidalgo and the Act of 1851. In accordance with the treaty, it is settled that lands within Mexican grants did not pass to the State under the Equal Footing Doctrine. *Knight v. United States Land Association*, 142 U.S. 161, 183-184 (1891).

The 1851 Act proceedings were intended to be conclusive against the United States and all those (like California) claiming under the United States. *United States v. O'Donnell*, 303 U.S. 501, 512-513 (1938). The conclusiveness of 1851 Act patents against belated assertions of conflicting rights was upheld by this Court in two closely analogous cases. *Barker v. Harvey* 181 U.S. 481 (1901); *United States v. Title Insurance Co.*, 265 U.S. 472 (1924) (Indian rights of perpetual occupancy). To hold now that the United States somehow secretly reserved rights in petitioner's land, and then conveyed those rights to California under the Equal Footing Doctrine would upset long-established titles that the Act of 1851 was intended to settle conclusively.

2. An independent reason for reversal is the determination by the General Land Office of the United States Department of the Interior in the 1851 Act proceedings that the property involved was not an arm of the sea and

thus not tidelands at the time of California's admission to the Union. California's attempt to re-open that question at this late date overlooks the fact that in the 1851 Act proceedings, the character of the land was squarely placed in issue. The original survey of the property was remanded for reexamination of that precise question, and upon the taking of additional evidence, the General Land Office and thereafter the Secretary of the Interior ruled unambiguously that the property involved, although identified as "inner bay" on the survey map, was not an "arm of the sea." This determination of fact is not subject to collateral attack after the patent has been issued. *Burke v. Southern Pacific R.R. Co.*, 234 U.S. 669, 691-692 (1914).

ARGUMENT

I. THE PATENT ISSUED PURSUANT TO THE TREATY OF GUADALUPE HIDALGO AND THE 1851 ACT PRECLUDES CALIFORNIA'S ASSERTED "PUBLIC TRUST" PROPERTY INTEREST.

A. Introduction.

Following the line of the Spanish missions stretching from San Diego to Sonoma north of San Francisco, most of the land along the California coast is located within former Mexican ranchos or pueblos. At the time of consideration of the Treaty of Guadalupe Hidalgo and the Act of 1851, Congress was well aware that most of these lands were owned by private parties. H.R. Ex. Doc. No. 50, 30th Cong., 2d Sess. 45 (1849); S. Ex. Doc. No. 18, 31st Cong., 2d Sess. 34 (1851). In the treaty the United States undertook to protect the private property of former Mexican citizens in California and in the Act Congress established procedures to review and confirm pre-existing private ownership.

Thereafter, for more than 100 years, land titles in former Mexican grants in California were established by reference to federal patents issued under the Act of 1851. It was a rule of property that interests not appearing on the face of the patent could not exist to impair that title. *United States v. Title Insurance Co.*, 265 U.S.

472 (1924). It was also settled that tidelands or wetlands within a Mexican grant did not pass to the State under the Equal Footing Doctrine. *Knight v. United States Land Association*, 142 U.S. 161, 183-184 (1891). Prior to the present case, the California courts had never suggested that the State owned any interest in wetlands which were patented to private Mexican grantees and which had never been owned by the State in fee.[21] (P.A. A10.)[22]

The central vice of the decision below is that it overturns property rights in patented Mexican grant lands thought to have been firmly settled in the nineteenth century. In its departure from prior precedents, the California Supreme Court felt compelled to recognize that under this Court's controlling decisions,[23] petitioner's title to wetlands within a confirmed Mexican grant could not be dislodged. However, the California court achieved virtually the same result by simply carving out a concurrent property interest which it denominated a "public trust" easement rather than a fee.

The State's asserted "public trust" easement is an expansive and permanent property interest which extinguishes fundamental aspects of private ownership. *See* pp. 10-12, *supra*. It would permit the State "to enter upon and possess" petitioner's land, to construct improvements on it, to afford public access and even to "preserve" the land in its natural state as open space without payment of compensation.[24] In exercising its "public trust" rights,

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[21] Indeed, no prior decision had suggested that any state received any property interest less than a fee under the Equal Footing Doctrine. On the contrary, the Equal Footing Doctrine has always been expressed in terms of "title to" and "absolute property in" the tidelands conveyed by the United States upon statehood. *See, e.g., Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65 (1873).

[22] 31 Cal. 3d at 298-299, 182 Cal. Rptr. at 605, 644 P.2d at 798.

[23] *E.g., United States v. Coronado Beach Co.*, 255 U.S. 472 (1921); *Knight v. United States Land Association*, 142 U.S. 161 (1891); *Beard v. Federy*, 70 U.S. (3 Wall.) 478 (1865).

[24] The scope of the State's asserted "public trust" interest is illustrated by this very case. While the City of Los Angeles initially asserted a right to dredge the shallow lagoon, the dredging project was abandoned by the time of trial, and the City now seeks to preserve the property as "open space." (C.T. 448, 796.)

the State has "absolute" power over the land. The State, not the private owner, is entitled to possession; the State, not the private owner, is entitled to develop (or not develop) the land; and the State, not the private owner, is entitled to control access. Thus, the California Supreme Court has now held that the State owns the same interest in these patented private Mexican grant lands that the court previously held the State "retained" upon alienation of tidelands which the State received as "absolute property" under the Equal Footing Doctrine.

As we shall show, the patent issued pursuant to the Treaty of Guadalupe Hidalgo and the Act of 1851 conclusively established the title of the Mexican grantees and cannot be undermined at this late date by carving out a state "public trust" property interest.[25]

B. The Treaty of Guadalupe Hidalgo Requires That The Property Of Former Mexican Citizens Be Protected.

In the Treaty of Guadalupe Hidalgo the United States undertook a special responsibility to honor and protect the property rights of Mexicans in the acquired territory. *See* H.R. REPT. No. 45, 40th Cong., 2d Sess. 2 (1868). Article VIII of the treaty required that "property of

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[25] The conclusiveness of the 1851 Act proceedings on such questions makes it unnecessary to consider whether under Mexican law the title of petitioner's predecessors to a rancho which included wetlands was burdened with some public servitude. The court below said it was "not aware of any authority" on the question whether such a servitude existed under nineteenth century Mexican law, but simply "assume[d]" that there was such a rule. (P.A. A9; 31 Cal. 3d at 297, 182 Cal. Rptr. at 604, 644 P.2d at 797.) Such an assumption is not only a weak foundation upon which to build a judicial decision, it is highly doubtful. Nothing on the face of the Mexican grant supports such an assumption. Such a broad public property interest was plainly not withheld by the standard stipulation in the Mexican grant that the grantee could enclose the rancho "without prejudice to the traversing roads and servitudes." *See United States v. Coronado Beach Co.*, 255 U.S. 472, 485-486 (1921); *Barker v. Harvey*, 181 U.S. 481, 499 (1901). *See also*, notes 30 and 32, *infra*. In any event, the Board of Land Commissioners was empowered to decide the scope of the grant under the "laws, usages, and customs" of Mexico and confirmation of unqualified title in petitioner's predecessors is binding. *See* pp. 21-23, *infra*.

every kind . . . shall be inviolably respected." (Art. VIII; P.A. A96.)

The protocol of May 26, 1848, which preceded the exchange of ratifications on May 30, 1848 and interpreted the treaty, reaffirmed that Mexican grants prior to the cession "preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the American tribunals." 5 H. MILLER (ED.), TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 381 (1937). As this Court said in *Peralta v. United States*, 70 U.S. (3 Wall.) 434, 439 (1865):

> "The Treaty of Guadalupe Hidalgo imposed the obligation on this government to protect titles to land in California acquired under Mexican rule. The country was new, and rich in mineral wealth, and attracted settlers, whose industry and enterprise produced an unparalleled state of prosperity. The enhanced value given to the whole surface of the country by the discovery of gold, made it necessary to ascertain and settle all private land claims. . . ."

See also United States v. Moreno, 68 U.S. (1 Wall.) 400, 404 (1863).

At the time the treaty was signed, it was recognized that large tracts of the best land in California (including that along the coast) had been granted to private parties and that the United States was bound to respect those grants. During a debate in the House of Representatives on subsequently proposed legislation to protect bona fide purchasers of lands, title to which was initially confirmed to private parties but later rejected by this Court, Congressman Phelps of California said:

> "Before our acquisition of California, the Spanish and Mexican Governments had made grants of large tracts of land throughout the State, embracing the most favorable locations, immediately on the coast and along the bays, rivers, and navigable streams. By the treaty of Guadalupe Hidalgo, signed on the 2d of February, 1848, the Government of the United States

agreed 'o respect the titles to land and property of the former citizens of Mexico."[26] CONG. GLOBE, 37th Cong., 2d Sess. 2639 (1862).

By its terms and under international law, the treaty's protection of private property (Article VIII) was self-executing and therefore subsequent legislation was not necessary to make it binding as the domestic law of the United States. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 141(1) (1965).[27] However, in order to ensure that Mexican grantees would not be subject to endless litigation challenging their rights to their property, Congress enacted legislation to provide a procedure for settling land claims in California once and for all, as we shall see in the next section.

C. The Act Of 1851 Was Designed To Separate Private Property From The Public Domain.

The mechanism that the United States established to carry out its treaty obligation that Mexican property rights "shall be inviolably respected" was the Act of March 3, 1851. (P.A. App. B-2.) The Act's author, Senator Gwin of California, described the relationship between the Act and the Treaty of Guadalupe Hidalgo in the following terms:

> "Under it [the Act] private property is perfectly protected, as it was required it should be by the treaty with Mexico and the law of nations." CONG. GLOBE APP., 31st Cong., 2d Sess. 56 (1851).

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[26] *See also* note 33, *infra*.

[27] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 141(1) at 433 (1965) contains an illustration directly analogous to Article VIII of the Treaty of Guadalupe Hidalgo:

> "The United States makes a treaty with state A by which A cedes certain territory to the United States. The treaty provides that all grants of land made by A prior to the date on which the treaty is signed 'shall remain ratified and confirmed' to the persons in possession of them. Under the rule stated in Subsection (1), when the treaty becomes binding between the United States and A, it is self-executing and takes immediate effect as domestic law in the United States."

Senator Berrien, a member of the Senate Judiciary Committee when it studied the Act, emphasized the point:

> "By the stipulations of the treaty we have bound ourselves to protect private property. We are about to institute a tribunal to ascertain what that private property is; and, having ascertained it, we are going to give the claimant, whose claim shall be confirmed, the evidence which a patent will afford him that his claim has been decided to be private property before the tribunal we have provided." CONG. GLOBE, 31st Cong., 2d Sess. 429 (1851).

The Act's purpose was to provide a procedure to determine Mexican land claims in California and thereby to separate private land from the public domain over which the United States exercised ownership. S. Ex. Doc. No. 26, 32d Cong., 1st Sess. 2 (1852); CONG. GLOBE, 31st Cong., 2d Sess. 349 (1851) (Sen. Berrien reporting on the action of the Judiciary Committee); CONG. GLOBE, 31st Cong., 2d Sess. 160 (1851) (Sen. Gwin); CONG. GLOBE APP., 31st Cong., 2d Sess. 135 (1851) (Sen. Gwin). This Court echoed that understanding in *Rodrigues v. United States*, 68 U.S. (1 Wall.) 582, 588 (1863):

> "The primary object of the [1851] act was to ascertain and separate the public domain from that which had become, under the Mexican government, private property. . . ."

Congress clearly recognized the strong public interest in prompt and final determinations of private land claims. During the Senate debate on the Act of 1851, Senator Berrien declared:

> "The great object has been that these proceedings should be brought to a close as speedily as possible, in order that the parties might be kept in their rights and the Government should ascertain what was public domain. . . ." CONG. GLOBE, 31st Cong., 2d Sess. 438 (1851).

See also CONG. GLOBE, 31st Cong., 2d Sess. 159 (1851) (Sen. Gwin) ("a final and speedy adjustment of their

claims"). The House Committee on Public Lands reported in 1854 that "The system adopted by this government for the settlement of claims in California, looks to a speedy and final settlement. . . ." H.R. REPT. No. 1, 33d Cong., 2d Sess. 13 (1854).

Although at one time 1851 Act cases occupied "a very heavy disproportion" of this Court's calendar, *Rodrigues v. United States*, 68 U.S. (1 Wall.) 582, 587 (1863), that has not been true in this century. Therefore, a brief exposition of the Act's procedural mechanism is appropriate.

The Act of 1851 created a board of three commissioners to determine the validity of claims to land in California. In order to accomplish its great public object, the Act required all persons "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present their claims to the Board of Land Commissioners within two years. (§§ 8, 13; P.A. A109, A111-A112.) The Act did "not create a voluntary jurisdiction, that the claimant [might] seek or decline"; rather it "comprehended every species of title or right, whether inchoate or complete," whether perfect or imperfect under Mexican law. *United States v. Fossatt*, 62 U.S. (21 How.) 445, 448 (1859); *Botiller v. Dominguez*, 130 U.S. 238 (1889).

This requirement of presentation applied to state Equal Footing claims in derogation of Mexican grants just as it did to competing private claims. *Knight v. United States Land Association*, 142 U.S. 161 (1891). Any land not claimed within two years, and any land a claim for which was finally rejected, was deemed "part of the public domain of the United States." (§ 13; P.A. A111-A112.) On the other hand, land — including tidelands — determined to be private property never became part of the public domain and, therefore, could not pass to the State under the Equal Footing Doctrine. *Knight v. United States Land Association, supra*, 142 U.S. at 183-184.

At the time the Commissioners embarked on their work it was estimated that there were 93,622,400 acres of land in California, of which 10,000,000, "the finest portion of the State," were claimed by Mexican and Spanish grantees. H.R. REPT. No. 1, 33d Cong., 2d Sess., 4-5 (1854). The enormity and complexity of the task facing them was well summarized by the Land Commissioners themselves in an 1854 report to the Secretary of the Interior:

> "[T]he variety and difficulty of the questions presented in the investigations of these claims are commensurate with their importance to the claimants and the country. . . .
>
> "From almost every source knowledge is required for the proper understanding of these cases. In these investigations questions arise under the national and civil law, expressly made a guide by the act of 3d March, 1851, under the Spanish law, which adopts generally the principles of the civil law, while it repudiates its authority; under the laws and decrees of independent Mexico, after the dominion of Old Spain was cast off; [and] under the acts of the territorial and departmental authorities of California, sometimes the legitimate representatives of the Mexican government, and at others in a state of uneasy rebellion against them. . . . A greater variety of subjects, or a wider field of investigation, was rarely, if ever, open to any tribunal, and the faith of the nation under the treaty of Guadalupe Hidalgo, justice to a conquered people, and a due regard to the provisions of the act of Congress organizing this commission, impose the duty of a careful investigation of the many questions presented in these cases."[28] *Id.* at 5-6.

To facilitate the work of the Commissioners, the 1851 Act required that in presenting their claims, claimants submit all supporting documents and testimony. (§ 8; P.A. A109.) In addition, at the instruction of the General

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[28] These passages also show that the Land Commissioners were well aware of their authority to render binding judgments on all questions relating to California land claims, whether arising under Mexican law or otherwise.

Land Office of the Department of the Interior, S. Ex. Doc. No. 26, 32d Cong., 1st Sess. 4 (1852), the Board of Land Commissioners promulgated regulations requiring all claimants to set forth "the nature and extent of every known interfering claim." COMMISSION FOR SETTLING PRIVATE LAND CLAIMS IN CALIFORNIA, REGULATIONS OF THE COMMISSIONERS FOR THE PRESENTMENT AND PROSECUTION OF CLAIMS 19 (1852). The Commissioners, who had broad judicial powers to compel and take testimony (§§ 6-7; P.A. A109), were then obligated to examine the claimant's evidence, along with that produced on behalf of the United States, and to determine the validity of the claim.[29] (§ 8; P.A. A109-A110.)

In making this decision, the Board was to be governed by "the laws, usages, and customs of the government from which the claim is derived . . . so far as they are applicable." (§ 11; P.A. A111.) Thus, the questions of the validity of a grant — including one for tidelands — under Mexican law and the existence of conflicting governmental claims were for the Commissioners to decide, and "it was a jurisdiction to decide rightly or wrongly."[30] *Thompson v. Los Angeles Farming Co.*, 180 U.S. 72, 77

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[29] The United States was represented in 1851 Act proceedings by a law agent, appointed by the President, "whose special duty it shall be to superintend the interests of the United States." (§ 4; P.A. A108.) In addition to this representation by the United States, at least from 1864 on California itself had the right, if it were "claiming to have an interest in the tract embraced by [a] survey, or in any part thereof," to file with the Surveyor General for California objections to the published survey of any rancho. 13 Stat. 332 (1864).

[30] The California Supreme Court believed that tidelands were inalienable under Mexican law (*Las Siete Partidas*) and therefore "assume[d]" — concededly without any authority — that if alienated, tidelands must be subject to some sort of retained "public trust" interest. (P.A. A9 & note 9; 31 Cal. 3d at 297, 182 Cal. Rptr. at 604, 644 P.2d at 797.) In making this assumption the California court ignored its own 1899 holding that a decision by the Board that land was "subject to absolute alienation" under Mexican law is conclusive. *Harvey v. Barker*, 126 Cal. 262, 277 (1899, *aff'd sub nom. Barker v. Harvey*, 181 U.S. 481 (1901). The determination that Mexican law permitted alienation of tidelands without any retained interest in the government was one properly for the Commissioners to make, and it was made consistently with the view of *Las Siete Partidas* taken by this Court in *Jover v. Insular Government*, 221 U.S. 623, 633 (1911). *See also* note 25, *supra*.

(1901). *See also United States v. Coronado Beach Co.*, 255 U.S. 472, 488 (1921). Once made, that decision was conclusive and not subject to collateral attack. *Id.*

The decisions of the Board of Land Commissioners were subject to direct attack, however. The 1851 Act gave any claimant and the United States the right to a trial *de novo* in the United States District Court. (§§ 9-10; P.A. A110-A111.) *See also Grisar v. McDowell*, 73 U.S. (6 Wall.) 363 (1867). In 1852 this review was made automatic by another act of Congress. 10 Stat. 99 (1852). A dissapointed litigant could appeal the district court's decision to this Court. (§ 10; P.A. A111.)

Following confirmation of the claim, the Surveyor General of California was obligated to have the land surveyed and a plat prepared. (§ 13; P.A. A112.) Upon approval of the survey by the Commissioner of the General Land Office of the United States Department of the Interior, a conclusive federal patent would issue to serve as an "instrument of quiet and security to its possessor."[31] *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491-492 (1865).

The Mexican grantees of Rancho La Ballona, the Machados and the Talamantes, followed the procedure prescribed by the Act of 1851. They filed a petition and supporting documents with the Board of Land Commissioners on October 2, 1852. (J.A. 19-20.) Among other things, the petition recited that "[t]here is no interfering claim" (J.A. 19), and neither California nor the United States interjected any such claim at any stage of the proceedings. After considering the evidence, the Board of Land Commissioners decreed the claim valid on February 14, 1854. (J.A. 21.) After a *de novo* review, the federal district court held on December 19, 1855 that "the claim of the appellees to a certain tract of land in Los Angeles County, West of the City of Los Angeles — about three leagues, and bordering on the sea shore, called the 'Ballona' is Valid." (J.A. 22.) The appeal of

[31] Even where the underlying Mexican grant is claimed to have been illegal and void, reconsideration of the issue is foreclosed by the decision of the Board of Land Commissioners. *More v. Steinbach*, 127 U.S. 70, 84 (1888).

the United States to this Court was thereafter dismissed, and the order of the district court became final on January 28, 1857. (J.A. 24-25.)

The required survey was made in July 1858 by Henry Hancock, Deputy Surveyor, and approved by the United States Surveyor General's Office in San Francisco on September 18, 1858. (J.A. 26.) The survey was approved in 1873, and the patent issued in that year. (J.A. 101-109.)

The patent issued by the United States to the Machados and the Talamantes did not reserve a "public trust" or any other interest to the State of California. No portion of Rancho La Ballona was found in the 1851 Act proceedings to be part of the public domain. Since the statutory scheme was fully complied with, the unqualified patent confirmed full and complete ownership in the Mexican grantees.

D. The Unqualified Title Confirmed Under the 1851 Act Bars The Assertion of California's Claim Now.

The security of the 1851 Act patent is assured by the Act's requirement that every claim to land in California "by virtue of any right or title derived from the Spanish or Mexican government" be presented to the Board of Land Commissioners for confirmation within two years. *See* p. 20, *supra*. The requirement of presentation was also basic to the 1851 Act's fundamental purpose of providing speedy and final separation of private property from the public domain. During the Senate debate on the Act, Senator Gwin of California asked rhetorically:

> "Unless land claimants are required to present their claims within a specified time, or forfeit them, how can we anticipate a speedy settlement of land claims in California?" CONG. GLOBE APP., 31st Cong., 2d Sess. 61 (1851).

See also CONG. GLOBE APP., 31st Cong., 2d Sess. 130 (1851) (Sen. Gwin). Thus, this Court early held that any claim not so presented was lost:

> "All claims to land that are withheld from the Board of Commissioners during the legal term for presentation, are treated as *nonexistent*. . . ." *United States v.*

Fossatt, 62 U.S. (21 How.) 445, 448 (1859) (emphasis added).

Two decisions of this Court compel the conclusion that California's failure to present its claimed "public trust" interest in the patent proceedings for Rancho La Ballona prevents its assertion at this late date. *Barker v. Harvey*, 181 U.S. 481 (1901), and *United States v. Title Insurance Co.*, 265 U.S. 472 (1924), both involved asserted Indian rights of perpetual occupancy of Mexican grant lands. In *Barker* the Indians relied upon language in a prior grant for part of the land which provided that the grantee "not molest (prejudicar) the Indians," as well as the fact that the grant stated that the grantee could fence the land "without interference with the roads, and other usages (servidumbres)."[32] 181 U.S. at 495. Nevertheless, this Court held that the Indians did not retain their right of occupancy because of their failure to present it in the patent proceeding:

> "If it be said that the Indians do not claim the fee, but only the right of occupation, and, therefore, they do not come within the provision of section 8 as persons 'claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government,' it may be replied that a claim of a right to permanent

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[32] The same provision in the Mexican grant for Rancho La Ballona was relied on by the California Supreme Court for the proposition that "the title of [petitioner's] predecessors was subject to the interests of the public in the tidelands included in the grant." (P.A. A9; 31 Cal. 3d at 297, 182 Cal. Rptr. at 605, 644 P.2d at 797-798.) The state court's reliance on this language is just as misplaced as was the Indians'. The provision "does not mean that the general occupation and control of the property is limited by any so-called servidumbres, but only that such full control shall not be taken as allowing any interference with established roads or cross roads, or things of like nature." *Barker v. Harvey*, 181 U.S. 481, 499 (1901). This 1901 ruling is an obviously more authoritative interpretation of nineteenth century Mexican law than that of the expert relied upon by the court below (P.A. A9), especially since the expert said he had "not acquainted" himself with "detailed provisions" of applicable law "with regard to servitudes" (J.A. 222) and he expressly declined to say whether "a servitude in Mexican law [could] apply to the waters affected by the tides." (J.A. 222-223.) On the contrary, the expert insisted that "a body of water subject to public uses" would never be granted by the Mexican government. (J.A. 223.)

occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. . . . *Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him burdened by an Indian right of permanent occupancy.*" *Id.* at 491-492 (emphasis added).

The issue of Indian rights of occupancy arose again 20 years later in *United States v. Title Insurance Co.*, 265 U.S. 472 (1924). The grant in that case, like the original grant in *Barker*, stipulated that it was without prejudice to the rights of the Indians. The patent issued on May 9, 1863, however, contained no mention or reservation of Indian rights. Los Angeles County Recorder's Office, Patents, Book No. 1, pp. 5-12 (1863).

In this Court, the federal government, asserting the Indians' right of occupancy, made an argument almost identical to that adopted by the California Supreme Court 60 years later to justify the imposition of the State's "public trust" interest on petitioner's land. Claiming that the Indian right of perpetual occupancy was not a challenge to the Mexican grantee's title, which had been confirmed and patented in the 1851 Act proceedings, the government argued:

> "[T]he Indian title is both legal and equitable in its nature, and has been variously likened to an easement, life estate, trust or use with which the fee is charged. . . . Further, when the fee passes from the Government into private hands under a general conveyance, it is, for the time being, only a naked fee." 265 U.S. at 474.

The Court rejected this argument. It declined the government's invitation to overrule *Barker*, observing that "the purpose of the Act of 1851 was to give repose to titles as well as to fulfill treaty obligations, and that it not only permitted but required all claims to be presented to the commission, and barred all from future assertion which were not presented within the two years." *Id.* at 483. The Court concluded:

"The question whether that decision shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago and affected many tracts of land in California, particularly in the southern part of the State. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision. The defendants in this case purchased fifteen years after it was made. *It has become a rule of property, and to disturb it now would be fraught with many injurious results.*" *Id.* at 486 (emphasis added).

The "public trust" rights assertedly reserved to the State — the right to "enter upon and possess" petitioner's land, the right to construct improvements on it, and the right to give the public access to the land — are no less substantial than the right of permanent occupancy asserted in *Barker* and *Title Insurance*. Those rights are indistinguishable from the rights the State retained upon the alienation of tidelands received in fee under the Equal Footing Doctrine. *See* pp. 10-12, *supra*. Just as the Indians in the *Barker* and *Title Insurance* cases had lost their claims by their failure to present them in the 1851 Act proceedings, so is the State barred from now pursuing its asserted "public trust" property interest because the State failed to present its claim in the time and manner required by the Act.

E. In The 1851 Act Proceedings, The United States Conveyed Any Interest It Had And Did Not Secretly Reserve Rights In Petitioner's Land.

Proceedings under the Act of 1851 are conclusive against the United States and all those — like California here — claiming under the United States. (§ 15; P.A. A113); *United States v. O'Donnell*, 303 U.S. 501, 512-513 (1938). In the absence of a reservation in the patent itself, the 1851 Act patent conveyed the entire interest of the United States in the land. *United States v. Title Insurance Co.*, 265 U.S. 472 (1924); *Moore v. Smaw*, 17 Cal. 199 (1861). Since the patent for Rancho La Ballona did not expressly reserve any interest, the California

court's opinion must be based upon the theory that the United States somehow secretly reserved rights in petitioner's land when it patented the land to the Mexican grantees under the Act of 1851. In other contexts, claims of such secret reservations in federal grants have been regularly rebuffed by this Court.

In *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), the plaintiff owned land bordering on a navigable stream. The land had previously been conveyed by the United States by patent without reservation. Pursuant to state statutory authority, the defendant constructed a dam, which flooded the plaintiff's land. As part of the defense to the lawsuit, it was claimed that the plaintiff's land came burdened with an easement in favor of improving navigation, which would permit the state to flood the land without payment of compensation. This Court flatly rejected the notion that there could be such a silent reservation in an unqualified patent, saying:

> "We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the State within which it lies; and that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream." *Id.* at 182.

One hundred years later the federal government itself asserted that there was an "implicit" reservation of an easement over public lands granted to the Union Pacific Railroad. In *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), the railroad's successors in fee to certain odd-numbered lots in the vicinity of a reservoir area used by the public for fishing and hunting brought an action to quiet title against the United States after the federal government had cleared a road across their land to afford the public access to the reservoir area. The government claimed that it held a silently reserved ease-

ment to pass over the land granted to the railroad in order to reach the land retained by the government, and the Court of Appeals agreed. This Court unanimously reversed, holding that there was no secret reservation in the federal land grant:

> "[B]oth as a matter of common law doctrine and as a matter of construing congressional intent, we are unwilling to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago, in the absence of a stronger case for their implication than the Government makes here." *Id.* at 681-682 (footnote omitted).

If a secret reservation is not recognized where the government disposes of public land over which it has complete dominion, there is even greater reason not to sanction a secret reservation where the United States was under a treaty obligation to protect the property rights of former Mexican citizens. One lower court considered that issue and held that an 1851 Act patent did not contain a silent reservation of a right-of-way for the public over the land.

United States v. Rindge, 208 F. 611 (S.D. Cal. 1913), involved Malibu Ranch, a Mexican land grant about 15 miles north of Rancho La Ballona. Malibu Ranch, which extended from the Pacific Ocean two miles inland where it backed up on public lands in mountain canyons, was patented to private parties under the Act of 1851. In 1907, Mrs. Rindge, the then owner, fenced the ranch in an attempt to keep out members of the public who had been travelling across her land to the adjacent federally-owned lands. The government brought suit to compel the removal of the fences asserting, among other things, "that at the time the patent was issued for the ranch there was reserved by implication to the government and its grantees a right-of-way over the land so patented to the public land back thereof, because there was and is no other practicable way to reach such land from a public highway." 208 F. at 615.

The court found that the doctrine of right-of-way by necessity was not applicable because such an easement was not a physical necessity, but merely a convenience. *Id.* at 619-622. The government's claim that it had silently reserved a public right-of-way was given short shrift by the court:

> "[T]he government owes no duty or obligation and reserves to itself or its subsequent grantees no interest in the land granted except such as may appear on the face of the grant, or the law under which it was made, or be declared by a general statute in force at the time the interest of grantee was acquired." *Id.* at 618-619.

Similarly, had the federal government desired to reserve any rights for itself or the State of California when it confirmed the Mexican grant for Rancho La Ballona and patented the land to its Mexican grantees, the government could readily (although perhaps not constitutionally) have done so expressly.[33] That it did not is ample evidence that no reserved "public trust" interest was intended. To allow a secret reservation of an interest as far-reaching as California's "public trust" to be asserted 100 years after issuance of the 1851 Act patent is to destroy the value of the patent as an "instrument of quiet and security." *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 492 (1865). As this Court said in *United States v. O'Donnell*, 303 U.S. 501, 512 (1938):

> "It is evident that the treaty obligations to quiet title of claimants under Mexican grants would be de-

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[33] At the time the 1851 Act was passed it was widely known that Mexican grants to private parties covered most of the coast of California. Secretary of State James Buchanan mentioned it in a letter transmitted to the House of Representatives along with other papers relating to the Treaty of Guadalupe Hidalgo. H.R. Ex. Doc. No. 50, 30th Cong., 2d Sess. 45 (1849). William Carey Jones also noted it in his report on the condition of land titles in California. S. Ex. Doc. No. 18, 31st Cong., 2d Sess. 34 (1851). Thus, the fact that Congress did not carve public rights to tidelands out of the private property to be confirmed under the Act of 1851 was not a result of ignorance, but that body's choice to live up to the United States' commitment under the Treaty of Guadalupe Hidalgo.

feated and the Mexican Claims Act would fail of its purpose if the finality of the Board's confirmation of claims under Mexican grants could be challenged by persons claiming under grants of public lands by the United States."

II. THE DETERMINATION IN THE 1851 ACT PROCEEDINGS THAT THE LAND WAS NOT TIDELANDS IS CONCLUSIVE AND NOT SUBJECT TO COLLATERAL ATTACK.

The determination by the responsible agency of the federal government in the 1851 Act proceedings that petitioner's land was not an arm of the sea and thus not tidelands provides an independent reason for reversal.[34] The state court's retroactive holding that the property "was an arm of the sea and tidelands at the time California was admitted to the Union in 1850" (P.A. A7)[35] was made in disregard of the contemporaneous conclusion as to the character of the land by the General Land Office of the United States Department of the Interior. As we shall show, the Land Office's determination is conclusive and cannot be overturned at this late date. *See, e.g., Burke v. Southern Pacific R.R. Co.*, 234 U.S. 669, 691-692 (1914); *Gardner v. Bonestell*, 180 U.S. 362, 369-370 (1901).

The confirmatory decrees of the Board of Land Commissioners and the federal district court established not only title to Rancho La Ballona, but also its boundaries, one of which was the "sea coast." (J.A. 21, 22.) After the dismissal of the appeal to this Court in 1857 (J.A. 24-25), the grant was surveyed by Henry Hancock, Deputy Surveyor of the United States, as required by the Act of 1851.[36] The Hancock survey, which showed the shore of

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[34] At that time the term "arm of the sea" was used synonymously with tidelands. *See, e.g., United States v. Pacheco*, 69 U.S. (2 Wall.) 587, 590 (1864).

[35] 31 Cal. 3d at 296, 182 Cal. Rptr. at 603-604, 644 P.2d at 796.

[36] The plat of Rancho La Ballona from the Hancock survey is found at J.A. 26.

the Pacific Ocean as a Rancho boundary, was approved by the United States Surveyor General in San Francisco on September 18, 1858, and forwarded to the General Land Office in Washington, D.C. (D. Ex. A, pp. 62-66.) On March 17, 1860, Commissioner Joseph Wilson of the General Land Office declined to approve the Hancock survey, noting that the survey contained an area just inland from the ocean which was labeled "inner bay." (J.A. 32-34.) He remanded the survey to the Surveyor General for reexamination with directions that, "unless good cause be shown to the contrary," the survey be amended to show the landward shore of the "inner bay," rather than the shore of the open ocean, as the Rancho boundary. (J.A. 34.)

Thus, the question of what constituted the "sea coast" within the meaning of the decrees of confirmation of the Board of Land Commissioners and the federal district court — whether it was the landward shore of the "inner bay" or of the open ocean — was squarely raised in connection with the approval of the survey. In addition, after the survey was subsequently readvertised (J.A. 35-38), in May 1869 a protest was filed by the grantees of Rancho San Vicente y Santa Monica to the north of La Ballona, who claimed that the northern boundary of Rancho La Ballona encroached on the southern boundary of their rancho. (J.A. 39-49.) In the proceedings that followed, the grantees of Rancho La Ballona filed affidavits dealing with the boundary questions raised both by the General Land Office and the protestants.

Three of the affidavits bore directly on the character of the land of the so-called "inner bay." The affidavit of Ignacio Machado, one of the grantees of Rancho La Ballona, stated:

> "Affiant further says that the feature shown on the the map of the Hancock survey as the 'inner bay' is not a bay or arm of the sea, but that in times of storms & floods the waves of the sea close the mouth of the creek with sand, and thus cause the waters to rise and overflow the land. That the waters of said overflow are

fresh and suitable and are used for watering cattle and horses. That at this time nearly all of the land represented as an 'inner bay' is dry land, and is used as pasturage." (J.A. 60.)

The affidavits of Jose del Carmen Sepulveda, the son of the owner to the north, and Tomas Talamantes, another of the grantees, were to the same effect. (J.A. 55, 58.)

In December 1872[37] J. R. Hardenbergh, the United States Surveyor General for California, made a report to Willis Drummond, the Commissioner of the General Land Office, on the survey of Rancho La Ballona. The Surveyor General explained the nature of the "inner bay" as follows:

"Referring to the points of objection set out in the letter of the Hon. Commissioner of March 17, 1860 we are satisfied that he was misled from the true facts of the case by some of the features of the map of the survey before him — that portion of the map marked 'Inner Bay' he evidently considered as a portion of the Sea and not included in the Diseño. . . . By referring to the original Diseño it will be seen that the word 'estero' is found written on the same near the sea shore: this I take to be the same place as that marked on the map of survey 'Inner Bay,' which is formed by the waters of the Ballona Creek and is increased or diminished in extent as the outlet of the same to the sea is more or less choked by the beach sands."[38] (J.A. 111.)

On the basis of the evidence in the case transmitted by Hardenbergh, on April 30, 1873 the General Land Office withdrew its earlier objection and approved the Hancock survey of Rancho La Ballona. (J.A. 84-94.) Commissioner Drummond concluded as follows concerning the "inner bay":

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[37] The handwritten document in evidence is dated December 18, 1873 (J.A. 110), but the year clearly should have been 1872. (*See* J.A. 110; D. Ex. A.)

[38] The Mexican law expert testified below that in the 1830s "estero" referred to "a pool or depression of water which accumulates on a seasonal basis" as a result of storms. (R.T. 1064-1065.)

"The character of this estero, or inner bay as it is marked on the plat of survey, is testified to by Tomas Talamantes, Jose del C. Sepulveda and Ignacio Machado, who in substance say it is not an arm of the sea, and that much of the tract represented as inner bay is suitable for pasturage. That this estero was included in the grant is shown by the *diseño* where the word 'estero' is written near the south boundary and about midway between the east and west boundaries as there represented; and *that it is not an arm of the sea is evident from the field notes and plat of survey which are not contradicted by any evidence in this case,* and which show that what this office in 1860, mistook for the mouth of an estero was meandered on its southeast side to within a few chains of the ocean, and on the east of said meandered line were found high hills, *that this inner bay is not an arm of the sea* and that the mouth of this estero is wholly outside the present survey of the Ballona rancho is also shown by an official survey of the rancho Sansal Redondo which adjoins the southern portion of the eastern boundary of Hancock's survey of Ballona." (J.A. 92; emphasis added.)

On June 12, 1873 the northern rancho claimants took an appeal of Commissioner Drummond's decision to the Secretary of the Interior. (J.A. 95-99.) Because of its impact on the location of the northern boundary, the "inner bay" received lengthy comment in their appeal. (J.A. 96-99.) Like Land Office Commissioner Wilson before them, the contestants asserted that the landward shore of the "inner bay," not the shore of the ocean, was the boundary of Rancho La Ballona. (J.A. 96-97.)

After considering the appeal, Secretary of the Interior Delano on November 17, 1873 affirmed Commissioner Drummond's decision. (J.A. 100.) The federal patent, confirming title to Rancho La Ballona, including the "inner bay," in petitioner's predecessors was issued on December 8, 1873. (J.A. 101-109.)

Thus, the character of the land within the "inner bay" was carefully considered by the General Land Office. Commissioner Drummond expressly found as a fact —

and the Secretary of the Interior affirmed his decision — that the "inner bay" on petitioner's land was not an arm of the sea and thus not tidelands.

The correctness of the Land Office determination is shown by the very evidence respondents introduced at trial to attempt to impeach that finding. Although respondents' expert, Professor Orme, testified that Ballona Lagoon was "entirely open to the sea" at the time of its creation 5,000 to 10,000 years ago (J.A. 164), he went on to say that "almost immediately sea level [was] established, [and] sand began drifting along the shore from the north to build out the beginnings of a barrier spit." (*Id.*)

By about 1450 A.D., the open lagoon had been transformed into a "barrier lagoon system," and "at about this time it may be quite likely that the barrier closed entirely across . . . a characteristic of barrier lagoon systems worldwide." (J.A. 166-167.) The barrier could be closed for "a matter of days, perhaps weeks — but certainly, for the most part, not more than a few months." (J.A. 175.) The closed barrier would subsequently be "breached by flood waters draining from the land." (J.A. 167.) Finally, "By the 19th Century it would appear that sediments had been fed into the lagoon to the extent that the area of [open] water was now substantially diminished." (*Id.*) The 1876 map relied upon so heavily by respondents and the lower court (J.A. 123) shows that most of the area depicted on the Hancock survey as the "inner bay" is mud flats and salt marsh, and that what water appears is the result primarily of the flow of freshwater rivers through the area to the ocean. (J.A. 144-145, 156.)

This picture of the "inner bay" as mud flats, salt marsh and fresh water pools whose outlet to the ocean was frequently closed for perhaps months at a time is entirely consistent with the affidavits before the Land Office and Commissioner Drummond's determination that the "inner bay" was not an arm of the sea. It is completely

inconsistent with the federal definition of tidelands, as expressed by this Court in *San Francisco v. LeRoy*, 138 U.S. 656, 671-672 (1891):

> "To render lands tide-lands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide-water over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses, or other uses to which up-land is applied."

The evidence before the Land Office as well as that adduced by respondents below shows that the "inner bay" was not subjected to the regular ebb and flow of the tide. At most, the barrier beach was occasionally overwashed with ocean waves. According to the 1876 map, much of the area would have been covered with grassy plants (*see* J.A. 140), and the 1870 affidavits submitted to the Land Office attested to the fact that the Mexican grantees' cattle grazed this land. *See* pp. 32-34, *supra*. Indeed, respondents' own expert opined that the first "significant impact" on the area by man may have been in the eighteenth or nineteenth century and "may have been associated . . . with cattle stomping in the salt marsh and pummeling the barrier beach and generally watering themselves in the briny." (J.A. 179.)

Under the Act of 1851, the General Land Office had unquestionable jurisdiction to determine the character of the "inner bay." *Compare Knight v. United States Land Association*, 142 U.S. 161, 182-184 (1891), *with Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 16-21 (1935). Defining the character of land for purposes of patent inclusion constitutes a determination of fact. *Burke v. Southern Pacific R.R. Co.*, 234 U.S. 669, 691-692 (1914) ("when a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the . . . character of the land"). As early as 1898 this Court was able to say:

> "[I]f there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is

that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts." *Johnson v. Drew*, 171 U.S. 93, 99 (1898).

This rule of conclusiveness is fully applicable to findings made by the General Land Office in the course of an 1851 Act proceeding. *See Gardner v. Bonestell*, 180 U.S. 362, 369-370 (1901) ("the determination of the Land Department in a case within its jurisdiction of questions of fact depending upon conflicting testimony is conclusive, and cannot be challenged by subsequent proceedings in court"); *More v. Steinbach*, 127 U.S. 70, 83 (1888).

Attempting to avoid the conclusiveness of the federal determination that petitioner's land was not tidelands, the California Supreme Court conjured up what it termed an "obvious ambiguity." (P.A. A7.)[39] To find the ambiguity" the California court pointed to a 1951 dictionary definition of "bay," which the court thought indicated that the "inner bay" referred to on the Hancock Survey was an "inlet of the sea." (*Id.*) Since the Land Office's determination was inconsistent with this definition, the court said that there was an "ambiguity." But concern as to the character of the "inner bay" was what caused the Land Office initially to remand the survey for examination of that very question. Its subsequent determination that the uncontradicted evidence established that the "inner bay" was "not an arm of the sea" is anything but ambiguous. Thus, the California court's reexamination of the 1850 character of the land to retroactively decree a major property interest incompatible with the unqualified title confirmed by the General Land Office violates the fundamental principle of the conclusiveness of patent determinations.

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[39] 31 Cal. 3d at 296, 182 Cal. Rptr. at 603, 644 P.2d at 796.

CONCLUSION

For all of the foregoing reasons, the judgment of the Supreme Court of California should be reversed and the case remanded for further proceedings consistent with the decision of this Court.

Respectfully submitted,

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June, 1983

NOTE TO STATE LANDS COMMISSION MAPS
"These maps have been prepared to show where the public trust may exist. If an application is received for lands within the outlined area it should be referred to the State Lands Commission for a determination of whether the lands in question are in fact subject to the public trust.
"This plat has not been approved by the State Lands Commission and does not establish boundary lines of any State-owned lands depicted thereon.
"This plat is subject to change and may not include all lands subject to the public trust. Any questions which arise should be directed to the State Lands Commission."
1961 United States Department of the Interior
Geological Survey Map, Venice Quadrangle,
with California State Lands Commission
"Public Trust" Line Superimposed
Venice
VENICE BEACH
MARINA DEL REY
B A L D W I N
PLAYA
AVALON
Playa del Rey
Breakwater
Light
Gas Wells

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No. 82-708
IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the Supreme Court of California.

BRIEF FOR RESPONDENT STATE OF CALIFORNIA.

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Questions Presented.

1. Whether petitioner's title to tide and submerged lands located within a former Mexican rancho grant is subject to a public trust easement where there is an *express reservation* of such rights in the grant of the Mexican government to petitioner's predecessors in interest, which grant was presented to and confirmed by the Board of Land Commissioners.

2. Whether petitioner's fee title, deraigned from this Mexican grant, is subject to a sovereign public trust easement in view of the fact that when petitioner's predecessors received the grant from Mexico it was subject to such rights irrespective of whether there was an express reservation as in this case, and in view of this Court's rulings that the confirmation of a title derived from a Mexican grant merely confirmed that which had been previously granted and did not determine sovereign rights in the property nor confer a new federal title.

3. Whether this Court should disturb the California Supreme Court's holding that petitioner's fee title, deraigned from a Mexican grant, is subject to a public trust easement where this Court has repeatedly ruled that the determination of the incidents of such a title does not provide a basis for the application of federal law.

4. Whether, where the confirmatory patent issued to petitioner's predecessors contains repeated references to the existence of an "inner bay" in its property description and an extensive lagoon is shown on the plat incorporated into the patent, it is a collateral attack on the patent to allow proof of the lagoon's existence to clarify the ambiguity arising when the patent is considered in light of statements made in proceedings leading to the issuance of the patent and the physical existence of the lagoon is also established by official maps of the United States and geologic data.

5. Whether this Court should disturb the California Supreme Court's determination that the State succeeded to the sovereign public trust easement over Ballona Lagoon upon its admission to the Union where this Court very early established that on statehood all later admitted states receive sovereign title interests remaining in tide and submerged lands to put them in the same position as the Original Thirteen States which created this Union.

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No. 82-708

IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

BRIEF FOR RESPONDENT STATE OF CALIFORNIA.

JURISDICTION.

For the reasons set forth in Arguments III and V below, this Court lacks jurisdiction to consider the questions raised in the petition. Respondent therefore respectfully requests this Court to reconsider its grant of certiorari herein.

STATEMENT.

This case concerns a portion of Ballona Lagoon, an arm of the Pacific Ocean extending into what was originally known as Rancho La Ballona when California was under Mexican rule. (Pet. App. A52.) The precise portion of the lagoon which is the subject of this litigation is part of the main channel which historically connected the landward reaches of the estuary with the sea.[1] This portion of the lagoon from at least 1850 to the present has been

[1]Appended hereto is a copy of the 1858 Hancock survey plat (appendix 1) and the 1876 United States Coast Survey map (appendix 2) with the subject matter of this action colored blue for identification purposes.

covered by tidal waters and has never been filled.[2] Today, it continues to serve as a connection to the sea, now for the adjacent Venice Canals, although tidegates have been installed to prevent flooding and the subject portion of the lagoon discharges into a man-made ocean entrance known as Marina del Rey. (Pet. App. A52-A54.)

The portion of Ballona Lagoon involved in this case is approximately one mile long and 100 feet wide. It is a habitat for marine life and migratory birds, including two endangered species, and the tidewaters flowing into the lagoon are of sufficient depth to be navigated. Because of these features, the public continues to use Ballona Lagoon for fishing, clamming, birdwatching, boating and swimming, as it has since the 1800's.[3] (R.T.

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[2]Both Summa and the Solicitor General seek to have this Court believe that a marsh or wetland is the subject matter of this lawsuit and that it is illustrated by the entire "inner bay" depicted on the 1858 Hancock survey and the entire historic Ballona Lagoon and marsh depicted on the 1876 United States Coast Survey map. (See Br. of Pet. 35; Br. for U.S. 9-10 and its appendix.) In fact, however, only a portion of the channel marked "inlet" on the Hancock survey (J.A. 26, *see also* appendix 1 hereto) and shown as the mouth of the lagoon on the 1876 United States Coast Survey map (J.A. 122, *see also* appendix 2 hereto) is at issue in the instant case. No marshlands or wetlands are at issue herein; this Court has before it only *tidelands* in the form of a lagoon that has always been recognized as an arm of the sea.

[3]Appended hereto as appendix 3 is a photograph of Ballona Lagoon, circa 1908, Lagoon, circa 1908, showing a hotel and a pavilion with its grandstand for viewing boat racing on the lagoon constructed on the lagoon's edge. W. Myers & I. Swett, *Trolleys to the Surf* 50 (1976).

It is not known to respondent State why both Summa and the Solicitor General would speculate that Ballona Lagoon "may have been made navigable in the 1960's as the result of the dredging of the Marina del Rey entry channel and the installation of the motorized tidegates" (*see* Br. of Pet. 3 n. 6; Br. for U.S. 11 n. 9), when there is *nothing* in the record to suggest it. Indeed, the record proves the contrary. On the basis of the voluminous testimony adduced at trial that the public has been navigating the lagoon since the *1800's*, the trial court held, independent of its determination of the public trust issue, that such public use had resulted in the implied-in-law dedication of the lagoon to the public under state law. (Pet. App. A54-A55, A68.)

298, 299, 435-438, 443-444, 452-456, 476-477, 678, 691, 694-695, 711-712, 714, 717.)

None of the neighboring developed or undeveloped dry land areas are involved in the decision of the court below.[4] (Pet. App. A16 n. 15.)

Indeed there is no challenge to Summa's underlying fee title to the lands in question. The only question presented is whether a public trust easement exists over the subject property by virtue of its character as tide and submerged lands.[5]

The court below determined that Ballona Lagoon is impressed with a public trust easement and has been so impressed since the time, prior to the grant to Summa's predecessors in interest, when

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[4]Thus, contrary to the assertion of the California Land Title Association ("CLTA"), no "investment-backed expectations" in such areas were impaired by the state court decision. (CLTA Amicus Br. 5-6, 14, 26, 28.)

CLTA's additional assertion that the state court's decision creates instability in title to 8½ million acres of California land (CLTA Amicus Br. 5) is advocates' hyperbole. Apparently, CLTA believes that 8½ million acres of land were once confirmed to Mexican grantees, but even if so, only a small portion of this acreage was ever tidelands. Still more limiting is the fact that only that portion of ranchos that were tidelands and that are still water covered are affected by the decision below. (Pet. App. A16 n. 15.) Although no inventory of such lands has been made by the State, even CLTA concedes that the acreage would not be substantial, since it acknowledges that the "Mexican government did not regularly convey beaches, bays, or navigable rivers and lakes into private ownership." (CLTA Amicus Br. 5.)

[5]Summa has appended to its Brief of Petitioner a map which may appear to be a map prepared by the California State Lands Commission. It is not. Summa has itself created this map. The only series of state maps in existence is that of the California Coastal Commission, which maps depict that agency's jurisdiction for coastal permit purposes. As demonstrated in appendix 4 hereto, each such map bears a map note expressly stating that its purpose is merely to depict a preliminary determination of administrative jurisdiction. Summa's implication that there exists a series of State Lands Commission maps depicting "where the public trust may exist" for title purposes is false.

it was owned by Mexico.[6] (Pet. App. A8-A9.) The state high court did not impress an interest on lands that previously had not been so encumbered; rather, it merely recognized what had always been the case: That the public trust on tidelands was observed by Mexico and that when Mexico granted Rancho La Ballona to Summa's predecessors, it reserved these public rights, both expressly and by operation of law. (Pet. App. A8-A15.) The same result would have been obtained under common law. *See People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913); *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). Indeed, in California there are already more than 80,000 acres of tidelands in private ownership subject to the public trust. Taylor, *Patented Tidelands: A Naked Fee?*, 47 Cal. St. B. J. 420, 421 (1972).

Summa, as the holder of the fee title to the land, has the right to make any use of the land it sees fit in the absence of the State's exercise of the retained public trust easement.[7] *See State of California v. Superior Court (Fogerty)*, 29 Cal.3d 240, 249, 625

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[6]In addition to holding that the Ballona Lagoon tidelands are subject to the public trust, the trial court found that the owners of Ballona Lagoon had impliedly dedicated it to the public for purposes of water recreation, transportation and for the passage of fresh sea water from the Pacific Ocean through the Ballona Lagoon to the Venice Canals. (Pet. App. A68-A69.) Each of these implied-in-fact and implied-in-law easements furnishes an independent basis for affirming the judgment of the trial court on state grounds. The issue of implied dedication was not addressed by the California Supreme Court because it found that all of the uses are included within the public trust. (Pet. App. A16.) Thus, if this Court should determine that the public trust does not exist over Ballona Lagoon, it should remand the case to the California Supreme Court for disposition of these admittedly state law issues. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 109 (1938).

[7]Although Summa knows that the trial court found the *State*, not the City, to be the administrator of the public trust over Ballona Lagoon (Pet. App. A68), it would have this Court believe that the City is now attempting to exercise the trust. (Br. of Pet. 15 n. 24.) This is not true.

In addition, Summa makes the statement that Chapter 77, Statutes of California, 1917, "reflected the common understanding that areas within Mexican grants were excluded from the property received by California upon its admission to the Union." (Br. of Pet. 6 n. 10.) Yet the meaning and effect of this state statute were litigated in the trial court and Summa's argument was rejected. (Pet. App. A54, A59, A68.)

P.2d 256, 261, 172 Cal.Rptr. 713, 718-719 (1981), *cert. denied*, 454 U.S. 865; *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 232, 625 P.2d 239, 252, 172 Cal.Rptr. 696, 709 (1981), *cert. denied*, 454 U.S. 865; *Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 402, 60 P.2d 825, 829 (1936); *People v. California Fish Co.*, 166 Cal. 576, 599, 138 P. 79, 88 (1913). Where improvements have been placed or constructed on such lands by the fee title owner, the State must compensate the owner for such improvements before exercising the trust. Calif. Pub. Res. Code § 6312; *People v. California Fish Co.*, 166 Cal. 576, 599, 138 P. 79, 88 (1913).

It should be noted that the State has infrequently exercised the trust in the last 133 years.[8] *See e.g., Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 401-403, 60 P.2d 825, 829-830 (1936) (where federal government also exercised its portion of the same easement). It is therefore not true that Summa can do nothing with its property. On the contrary, as far as the public trust is concerned, Summa, in common with the private owners of the other 80,000 acres of state patented tidelands subject to the public trust in California, may make any use of the property that does not conflict with public trust needs.

SUMMARY OF ARGUMENT.

The public trust has always existed over Ballona Lagoon. While under Mexican sovereignty, Mexican law impressed these tidelands with public rights similar to our own common law public trust. Las Siete Partidas, Partida III, title XXVIII, laws III, VI; J.A. 120-121.

That Mexico treated its tidelands in the same manner as a common law nation such as the United States is not remarkable; both the civil and common law systems trace their public trust doctrines to the Code of Justinian. Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762, 763-772 (1970). And the reason for the rule is

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[8]An exercise of the public trust by the State requires public hearings and findings of necessity for commerce, navigation, fishing, or for the environmental or recreational needs of the people of the State. *See Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790 (1971).

the same — the fundamental importance of the tidelands and navigable waters to the people. As this Court noted with approval in *Illinois Central*:

> "The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement[.] . . ." *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 458 (1892).

Moreover, as this Court has recognized, the sovereign's public trust rights exist because of the *common* rights to the resource. Since it is the inherent duty of a sovereign to protect the resource for the people, control over these areas has been consistently characterized as a fundamental attribute of sovereignty, no more subject to abdication than the police power. *Montana v. United States*, 450 U.S. 544, 552 (1981); *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 453 (1892).

It is because of this duty to protect the common tidelands resource that it was very early established in England that a private grant of tidelands by the sovereign conveyed the private right (jus privatum), but reserved the public right (jus publicum) held by the Crown for his subjects.[9] *Attorney General v. Parmeter*, 10 Price 378, 147 Eng. Rep. 345 (Ex. 1811), *aff'd* by House of Lords *sub nom. Parmeter v. Gibbs*, 10 Price 412, 147 Eng. Rep. 356 (H. L. 1813). Mexico similarly established that public rights were to be reserved in a private grant of tidelands in its grant of Rancho La Ballona to Summa's predecessors in interest (*see Apalachicola Land & Development Co. v. McRae*, 86 Fla. 393, 98 So. 505 (1923), *appeal dismissed*, 269 U.S. 531; J.A. 5), and the state high court merely recognized these preexisting public rights as consistent with the common law public trust. In so doing, the state court did not "conjure up" rights, divest Summa of any

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[9]This is consistent with Lord Chief Justice Hale's seventeenth century pronouncement of the law: "The *jus privatum* that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to public use." *De Jure Maris* 22. Compare the Solicitor General's statements regarding English law, which statements do not treat the effect on public rights of a private tidelands grant, the sole issue here. (Brief for U.S. 12-13 n. 11.)

incident of title, or depart in any way from established law.

Indeed, the state court's decision is fully in accordance with the Treaty of Guadalupe Hidalgo (9 Stat. 922; Pet. App. A90-A107) and the Act of March 3, 1851 "to ascertain and settle the private Land Claims in the State of California." 9 Stat. 631; Pet. App. A108-A114. Under the Treaty and the Act, the United States promised to confirm that which had been previously conveyed by Mexico. (Pet. App. A96, A109-A112.) Since Ballona Lagoon was impressed with the public trust under Mexican law, and the same public rights are protected by the common law, the continued existence of these rights in the lagoon was quite properly recognized below. But Summa would have this Court confer on it a quality of title higher than its predecessors were granted under Mexican law and than private parties were granted in tidelands outside ranchos under the common law, despite the fact that the Treaty of Guadalupe Hidalgo required only that property owners deriving title under Mexican law ". . . enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States." 9 Stat. 922, art. VIII; Pet. App. A96.

That no greater rights were intended to be given to property owners such as Summa is clear from the Senate debate on the Act of 1851, where Senator Berrien, a member of the Senate Judiciary Committee when it studied the Act, emphatically declared:

> "[This amendment] would have given to the citizens of California a right which they would not have enjoyed under their own Government, if that Government had continued over them, and it would have given them a right which other citizens of the United States had not enjoyed as it relates to the United States. . . . Those persons, then, neither as Mexican citizens nor as citizens of the United States, are entitled [to this right.] What is asked by this amendment? It is asked that we should give them something more than was stipulated by the treaty; something more than, as Mexican citizens, they could have enjoyed, and something more than we accord to citizens of the United States." Cong. Globe, 31st Cong., 2d Sess. 375 (1851). The amendment was defeated.

Clearly, no greater rights should be given to Summa in this case, especially since Summa's title was made subject to an

express reservation of public rights, including the public trust, and this title was confirmed by the Board of Land Commissioners. Even had there not been such an express reservation in the conveyance to Summa's predecessors, however, the public trust would exist by operation of law. This interest was unaffected by the confirmation proceedings and on statehood devolved to the State. The state high court therefore properly acknowledged the existence of the public trust, and, this holding being a state law question according to long established precedent of this Court, it should not now be disturbed.

Moreover, the state high court's acknowledgment of the existence of Ballona Lagoon as tidelands was also proper since the existence of the channel that is the subject matter of this action has never been challenged, since it is shown on all United States surveys of the coastline and since the evidence considered by the state court clarifies an ambiguity resulting when Summa's patent is read against statements made in the confirmation proceedings.

ARGUMENT.

I.

PRIVATE TITLES TO TIDE AND SUBMERGED LANDS WERE SUBJECT TO A PUBLIC TRUST EASEMENT UNDER MEXICAN LAW SIMILAR TO THE COMMON LAW PUBLIC TRUST EASEMENT; THE CALIFORNIA SUPREME COURT MERELY RECOGNIZED THIS FACT.

A. Summa's Title Was Subject to an Express Reservation in Favor of the Public Under Mexican Law and This Title With Its Reservation Was Confirmed by the Board of Land Commissioners.

On November 27, 1839, Juan B. Alvarado, constitutional Governor of the Department of the Californias, granted the land known by the name of "Ballona" to Agustin and Ignacio Machado and Felipe and Tomas Talamantes on condition that:

> "2nd. They may enclose it *without prejudice* to the traversing roads and *servitudes* . . ." (J.A. 5; emphasis added.)

The La Ballona Rancho Grant, with its conditions, was presented to the Board of Land Commissioners and confirmed by it on February 14, 1854. In its Decree of Confirmation, the Board specifically referred to the original grant for a description of that

which had been confirmed.[10] (J.A. 21.)

Likewise, the United States District Court also specifically made reference to the original Mexican grant as controlling in its opinion affirming the Board's confirmation of the La Ballona grant. (J.A. 22-23.)

At trial, Summa's own expert witness on Mexican law, Señor Federico Laffan, was asked about the significance of this condition contained in the La Ballona grant:

> "Q: In the expediente, Governor Alvarado granted Rancho Ballona to the Talamantes and Machados without prejudice to enclosing the traversing roads and servitudes. What does that mean to you?
>
> "[Señor Laffan]: Well, it represents an expression of art which appears in deeds of conveyance even today, *where rights of the public are saved in the conveyance of large tracts of land by the authorities.*
>
> "That is to say, there may have been expressly constituted rights of traverse on this land or such right and which at the time may not be known to the governor as he is writing this thing, so he is saving his ignorance." (J.A. 222; emphasis added.)

Thus, according to Summa's own expert on Mexican law, the La Ballona grant contained an express reservation of all public rights within the rancho's perimeter.[11]

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[10]Summa's bald assertion that the Board of Land Commissioners determined that Ballona Lagoon had been granted to its predecessors without any retained public interest (Br. of Pet. 22 n. 30) is discredited by its lack of any supporting authority; more importantly, it is flatly contradicted by the Decree of Confirmation itself which refers back to the original Mexican grant containing the express reservation of public rights.

[11]It matters not whether Governor Alvarado actually intended to grant the tidelands of Ballona Lagoon into private ownership or even whether he was aware of the lagoon's existence when making the grant. This reservation shows plainly that it was the policy of the Mexican government in making grants to preserve all existing public rights. If such a reservation was "boilerplate" as the Solicitor General suggests (Br. for U.S. 13), it nevertheless served an important policy support role by, as Señor Laffan put it, "saving [the Governor's] ignorance." (J.A. 222.)

The California Supreme Court reached the identical conclusion early in its review of Mexican rancho grant cases. In *Ferris v. Coover*, 10 Cal. 589 (1858), the court examined the significance of a similar "condition" contained in a Mexican land grant and held that this was not a true condition, but a "*reservation in favor of the public.*" *Id.* at 615 (emphasis added).

Again the following year, the California Supreme Court held that a Mexican land grant made subject to the condition that the grantee "inclose the premises without prejudice to the roads and easements" was not really a condition, but rather:

> ". . . the expression of the power of the grantee with a reservation of easements[.]" *Scott v. Ward*, 13 Cal. 458, 472 (1859).

From the foregoing it is clear that when Rancho La Ballona was granted "without prejudice to the . . . servitudes", it was a fee simple conveyance subject to a reservation in favor of the public.[12]

B. The Reservation in Favor of the Public Contained in the La Ballona Rancho Grant Included the Public Trust Easement Over Tide and Submerged Lands, According to Well Settled Principles of Mexican Law as Well as Summa's Own Expert at Trial.

It is clear that the reservation of public rights in the Mexican grant obtained by Summa's predecessors included the public trust over tide and submerged lands, for Mexican law recognized pub-

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[12]Summa and the Solicitor General cite *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921) and *Barker v. Harvey*, 181 U.S. 481 (1901) for the proposition that this reservation did not include public trust rights. (Br. of Pet. 16 n. 25; Br. for U.S. 14.) In *Coronado Beach Co.*, the issue before the Court was whether fee title to submerged lands could be confirmed to be in private ownership. Significantly, the United States in that case itself advised the Court that no matter what its ruling was on this issue, the lands would still be subject to the public trust:

> "Defendant's right, title or interest, if any, in the lands below high-water mark are in any view subject to the paramount *servitudes* and powers of the federal and *state governments* to protect navigation, commerce, and fishery." (255 U.S. at 482; emphasis added.)

This conclusion is consistent with this Court's observation in *Barker v. Harvey*, 181 U.S. 481, 499 (1901), that the confirmatory patentee's full control of his property should not be taken as allowing any interference with the " 'roads, cross roads, and other usages' (servidumbres)." *Id.*

lic rights in such lands similar to our common law public trust easement.

During Mexican sovereignty, Alta California's real property laws, contained in Las Siete Partidas, impressed the sea and seashore with a right of common use:

> "The things which belong in common to the creatures of this world are the following, namely; the . . . sea and its shores, for every living creature can use each of these things, according as it has need of them. For this reason every man can use the sea and its shore for fishing or for navigation, and for doing everything there which he thinks may be to his advantage." Partida III, title XXVIII, law III; J.A. 120.
>
> "Rivers, harbors, and public highways belong to all persons in common[.]" Partida III, title XXVIII, law VI; J.A. 121.

In *Lux v. Haggin*, 69 Cal. 255 (1886), the California Supreme Court interpreted the Partidas pertaining to the sea and seashore as preserving the public's right of common use therein:

> "Whatever the common use to which rivers, harbors, and public roads were subjected, the enjoyment of such use would exclude the notion of an exclusive use or occupation which must interfere with a like use by others." *Id.* at 317.

Las Siete Partidas has been similarly interpreted by courts in the states of Florida — *Apalachicola Land & Development Co. v. McRae*, 86 Fla. 393, 98 So. 505 (1923), *appeal dismissed*, 269 U.S. 531; Louisiana — *Dickson v. Board of Com'rs of Caddo Levee Dist.*, 210 La. 121, 26 So.2d 474 (1946); New Mexico — *Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929); Arizona — *Clough v. Wing*, 2 Ariz. 371, 17 P. 453 (1888); *Maricopa County Municipal Water Dist. No. 1 v. Southwestern Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931); and Texas — *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926); *Landry v. Robison*, 110 Tex. 295, 219 S.W. 819 (1920); *Rosborough v. Picton*, 12 Tex. Civ. App. 113, 34 S.W. 791 (1896).

Moreover, early on, the State's Surveyor-General not only recognized the Partidas' rights of common use, but also acknowledged the reason for their development:

> "The inhabitants of all arid countries being impelled by their needs have, from time immemorial, given much at-

tention to the laws regulating the public or common use of flowing waters.

. . . .

"The jealous care with which the Spanish laws have from the earliest times granted such common rights as pertain to the use of waters, is shown by the 'Partidas,' which declare: 'That the "ribero del mar" (sea beach), the space between high and low tide, cannot be granted to any person, nor can the exclusive right to the use thereof be conceded to any one whomsoever; but, that all shall have a right to use the same' — in other words, that it should be reserved for public use." Report of the Surveyor-General of the State of California 12 (1886-1888).

Indeed, even Summa has conceded the Partidas' right of common use. For it was Summa, through its Mexican law expert at trial, who confirmed that Las Siete Partidas is the applicable law and that under this law the public had a property interest in tide and submerged lands:

"[Señor Laffan]: The law of Siete Partidas is the applicable law. The rules of law 3 and law 6 that we have referred to are specifically the rules which are applicable." (J.A. 220.)

"[A]ccording to these laws, the public had a property interest in the sea, seashore and in the rivers which, according to the commentators, definitely refers to running waters, to the ports and to the public roads and, as a property right is involved, therefore, the right of using these."[13] (J.A. 212.)

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[13]Summa, not surprisingly, is now attempting to distance itself from its Mexican law expert. (See Br. of Pet. 25 n. 32.) However, at trial, Summa relied on Señor Laffan to prove that Mexican law recognized public rights in tide and submerged lands, Summa's aim being to persuade the court that (1) because of these public rights a tidal waterbody would not have been granted by Mexico, and (2) having been included in a private land grant, Ballona Lagoon must not have been tidal. (*See* C.T. 359, 623.) Unfortunately for Summa, it persuaded the court on the law but not the facts. The trial court found that under Mexican law tidewaters were subject to rights of the public. It further found that Ballona Lagoon was tidal and hence subject to these public rights. (Pet. App. A52-A53.)

Moreover, Summa's Mexican law expert established that the Partidas' rights of common usage would be considered servitudes. (J.A. 222.)

Thus, when the Mexican sovereign reserved the "servitudes" in the La Ballona Rancho grant, it was a reservation of the public rights of common usage contained in Las Siete Partidas, rights which include the public trust easement over tide and submerged lands.

This conclusion is confirmed by the following reservation in *Ferris v. Coover*, 10 Cal. 589 (1858):

> "He may enclose it, without prejudice to the paths, highways, and privileges, particularly the traffic and navigation of the rivers." *Id.* at 595.

Since "navigation of the rivers," one of the rights enumerated in laws III and VI of the Partidas, is given as *one example* of the public rights reserved in the conveyance, it is clear that the public rights reserved included those contained in the Partidas, such as the public trust easement.

C. The Public Trust Easement Being of Such Fundamental Importance, It Was Not Even Necessary for This Public Right to Be Expressly Reserved for Private Titles to Tide and Submerged Lands to Be Subject to Such an Interest Under Mexican Law.

Quite apart from the express reservation in the grant to Summa's predecessors, the public rights in Ballona Lagoon would have been deemed reserved by operation of law, such was the importance of public rights in tide and submerged lands under Mexican law. Indeed, this Mexican right of common use, expressed in terms of a reservation or servitude, is quite similar to our common law public trust easement. (Compare Partida III, title XXVIII, laws III, VI with *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). And like our common law public trust, even privately owned tidelands were subject to a reservation for public use under Las Siete Partidas.

This was expressly held in *Apalachicola Land & Development Co. v. McRae*, 86 Fla. 393, 98 So. 505 (1923), where the court stated:

> "[Under Las Siete Partidas] a grant or concession of lands under navigable waters and tide lands was not in accord with usual customs of the Kingdom, such lands and waters being held as res communes for the public use; and a conveyance of them to private ownership could be consummated only by a clear showing of express sovereign intent (see *Jover y Costas v. Insular Government of the Philippine Islands*, 221 U.S. 623, 31 Sup.Ct. 664, 55 L.Ed. 844); and *even this would not exclude the public use of the lands and water and the natural products thereof*[.]" *Id.* at 433, 98 So. at 518 (emphasis added).

Again stressing that under Las Siete Partidas a private grant of tidelands reserved those same public rights which the common law terms public trust rights, the court in *Apalachicola* held:

> "[Pursuant to Las Siete Partidas if the sovereign] had granted, or had expressly authorized a grant of submerged lands below high-water mark on the bays of the sea, such a grant might under some circumstances carry a bare legal title, but not a right of private ownership in submerged lands under the waters of the bay or sea, thereby excluding navigation, fishing, the taking of oysters or other shell fish, and other purposes in which the public have an interest as of common right, subject to governmental regulation for the good of the public." 86 Fla. at 451, 98 So. at 524.

These principles are directly applicable to Ballona Lagoon. Being *tidelands*, and thus constituting part of the "sea and its shores", under Mexican law, Ballona Lagoon was held in common for the benefit of the public and was not susceptible of exclusive private use. Las Siete Partidas, Partida III, title XXVIII, laws III, VI; J.A. 120-121.

Nevertheless, as this Court has observed, both the Spanish and the Mexican sovereigns were capable of alienating such lands.[14] *Jover v. Insular Government*, 221 U.S. 623, 629 (1911); *San Francisco v. LeRoy*, 138 U.S. 656, 670-671 (1891). In view of

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[14]This is not to say that tide and submerged lands were generally alienable under Las Siete Partidas. As *Jover* so clearly instructs, a conveyance of such lands could only be had on a solid showing of express sovereign intent. *Jover v. Insular Government*, 221 U.S. 623 (1911).

these authorities, Summa's fee ownership of Ballona Lagoon has never been at issue in this litigation.[15] But this does not end the matter; it is the starting point. For under Las Siete Partidas, even privately owned tidelands remained subject to a retained public trust interest. *Apalachicola Land & Development Co. v. McRae*, 86 Fla. 393, 433, 451, 98 So. 505, 518, 524 (1923).

Although the *Apalachicola* case involved grants by the Spanish sovereign in Florida, its legal conclusions are appropriate herein because as the Solicitor General points out, "the governing law was Las Siete Partidas, the same Code invoked here as imposing a perpetual easement on the tidelands area encompassed in the Ballona Rancho grant. We reasonably may suppose that Mexico construed that provision no differently." (Br. for U.S. 15.)

Thus, we reasonably may conclude that when Mexico conveyed legal title to Ballona Lagoon, it did not thereby exclude the public rights therein. On the contrary, as discussed above, these public rights were specifically reserved in the grant to Summa's predecessors in interest.[16]

II.

EVEN HAD THERE NOT BEEN AN EXPRESS RESERVATION OF PUBLIC RIGHTS IN THE CONVEYANCE TO SUMMA'S PREDECESSORS, THE PUBLIC TRUST WOULD EXIST IN BALLONA LAGOON, UNAFFECTED BY THE CONFIRMATION PROCEEDINGS.

A. Sovereign Rights Such as the Public Trust Were Not Within the Jurisdiction of the Board of Land Commissioners Under the Act of March 3, 1851.

Under the Act of March 3, 1851, the Board of Land Commissioners was charged with investigating the validity of *private* land grants made by the prior sovereign, and, if found to be valid,

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[15]California recognizes the underlying fee title of Summa to the subject lands in accordance with prior decisions of this Court, none of which, the Solicitor General concedes (Br. for U.S. 20), dealt with the incidents of such ownership. *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921); *Knight v. United States Land Association*, 142 U.S. 161 (1891); *San Francisco v. LeRoy*, 138 U.S. 656 (1891).

[16]The Solicitor General wonders why a government would desire to preserve "wetlands that were granted out presumably because they served no public purpose." (Br. for U.S. 15.) Far from "serving no public purpose" we know from the earliest records that Ballona Lagoon

(footnote continued on following page)

ascertaining their boundaries. 9 Stat. 631. Nothing in the Senate debate on the Act of 1851, the Act, or Regulations of the Commissioners indicates that *sovereign* rights, which were never the subject of a grant by the prior sovereign, also required confirmation.[17] Indeed, this Court has consistently held that such in-

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tidelands have been used by the public for hunting, boating, fishing, clamming and recreation since the 1800's. (See, Statement, *supra*) It was for such public purposes that tidelands were preserved by force of law in nineteenth century Mexico just as they were in nineteenth century America.

[17]Both Summa (Br. of Pet. 20) and the Solicitor General (Br. for U.S. 24-25) assert that the requirement of presentation did apply to state sovereign claims. But neither cites authority that in fact supports this farfetched proposition. Indeed, all the authority is to the contrary.

In the Senate debate on the Act of 1851, it was made perfectly clear that the Congressional intent in drafting the Act was to separate those lands previously granted by Spain and Mexico from federal public domain lands so that the latter could be sold without fear of interfering with Spanish or Mexican grants. In the words of the Act's author, Senator Gwin of California:

> "Thus we have public and private property blended together in one common mass; and it is the duty of the Government to have them separated, so that bona fide claims may be respected and severed from the public domain, and the latter may be disposed of, and fee titles to the same given to our citizens without fear of conflict or interference." Speeches of Mr. Gwin, of California, in the Senate of the United States, on Private Land Titles in the State of California 43 (1851).

From this it is seen that Congress intended to convey, or at least be able to convey, all lands that were not confirmed under the 1851 Act. Since sovereign rights may not be sold (*Montana v. United States*, 450 U.S. 544, 552 (1981)), there was no need for them to be segregated; consequently, Congress simply did not envision, or provide for, the presentation of state sovereign rights under the Act. And in practice the State took no part in these proceedings.

Further, the Act itself precluded the presentation of sovereign claims. The Act provides that for *all* claims finally confirmed a patent shall issue to the claimant upon presentation to the General Land Office of a certificate of confirmation and a plat or survey of the land confirmed. (§ 13; Pet. App. A112.) The survey was to be conducted by the Surveyor-General of California, whose duty it was to cause all confirmed *private* claims to be surveyed. *Id.* Clearly it was contemplated that only private claims be presented, surveyed and confirmed by patent under the Act. Summa would have had the State obtain a private confirmatory patent for its sovereign rights.

The Regulations of the Commissioners likewise were directed to private claimants asserting a grant from Spain or Mexico, and not to

terests were simply not within the jurisdiction of the Boards. *Fremont v. United States*, 58 U.S. 541 (1854); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836).

In *Fremont v. United States*, 58 U.S. 541 (1854), a case challenging the confirmation of fee title to a Mexican land grant, it was argued that the confirmation was invalid because the grant contained a mine which under Mexican law belonged to the sovereign. This Court held that on appeal from a decision of the Board of Land Commissioners, the inquiry was limited to the validity of the fee title and the boundaries of the grant, the Board having *no jurisdiction* to determine whether there were any outstanding rights of *sovereignty* in the land. In this Court's words:

> ". . . The only question before the court is the validity of the title. And whether there be any mines on this land, and, if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court, by the act of 1851." 58 U.S. at 564.

Thus, since the Board did not have jurisdiction over sovereign rights, California could not have presented a claim under the 1851 Act.

The Solicitor General states that this Court overruled *Fremont* in *United States v. Castillero*, 67 U.S. (2 Black) 17, 166-169 (1862). (Br. for U.S. 26 n. 26.) He is incorrect. In *Castillero* the grantee claimed only a mining right, not a land grant, and the question was whether a claim to a mining right was a claim to land within the meaning of the Act of March 3, 1851, and so within the jurisdiction of the Board of Land Commissioners for purposes of confirmation. This Court held that the Board did have

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sovereign rights. For example, the claimant was to provide "the dates of the original grant and of the several assignments or conveyances." Commission for Settling Private Land Claims, Regulations of the Commissioners for the Presentment and Prosecution of Claims (1852). Obviously this was not applicable to the State.

jurisdiction to determine the validity of such a claim and define its location, as any other *private claim to land*. However, *Castillero* did not purport to say that the Board had jurisdiction to determine sovereign rights, just as *Fremont* did not purport to say that a private grantee of a mine under Mexican law could not present his claim for confirmation under the Act of 1851.

Again in *Townsend v. Greeley*, 72 U.S. (5 Wall.) 326 (1866), this Court set forth the limits of the Board's jurisdiction under the 1851 Act. Again the Court held that only legal titles and boundaries were questions for determination in the confirmation proceedings. Thus, as stated above, sovereign claims could not have been presented to the Board. In the words of the Court:

> "[T]he government provided for discharging the obligation of protection cast upon it by the stipulations of the treaty [of Guadalupe Hidalgo], and at the same time for separating private lands from the public domain. By proceedings under the act [of March 3, 1851], imperfect rights — mere equitable claims — might be converted by the decrees of the board [of Land Commissioners] or courts, and the patent of the government following, into legal titles; but *whether the legal title thus secured to the patentee was to be held by him charged with any trust, was not a matter upon which either board or court was called upon to pass*. If the claim was held subject to any trust, before presentation to the board, the trust was not discharged by the confirmation and the subsequent patent. . . ." 72 U.S. (5 Wall.) at 335 (emphasis added).

From this it is seen that sovereign rights were not the subject of the proceedings to confirm private titles conveyed by prior sovereigns under the Act of 1851. Such rights were not foreclosed by the proceedings. The proceedings merely determined that the confirmed lands were not federal public domain lands available for sale or donation. Sovereign rights were thus not required to be placed before the confirmatory bodies and continued to exist by operation of law.[18]

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[18]*Barker v. Harvey*, 181 U.S. 481 (1901) and *United States v. Title Insurance Co.*, 265 U.S. 472 (1924), are not to the contrary. Both concerned Indian rights of occupancy. The Indians claimed that the 1851 Act did not require presentation of a claim to land less than a full fee, and thus their claim to a right of occupancy was not abandoned when not presented. This Court held that the Indians' claim to a right of occupancy did come within the 1851 Act, constituting a *private* claim

B. This Court Has Recognized That Public Rights in Property Arising Under a Prior Sovereign Survived the Confirmation of Private Titles.

In the leading case of *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836), this Court acknowledged that public rights in property originating under a prior sovereign survived the change in sovereignty and the confirmation of private titles, and were entitled to the respect accorded such rights under our system of government.

In *New Orleans*, the dispute arose as a result of the fact that while Louisiana was part of Spain and France, those sovereigns had dedicated land in the City of New Orleans for public use as quays. Upon the cession of Louisiana to the United States, the federal government claimed that those public rights had been terminated by virtue of the change in sovereignty. Adding more force to the government's argument was the fact that the City had presented its claim to the Board of Land Commissioners for confirmation and the Board had rejected the claim.[19] 35 U.S. (10

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to land, and should have been presented to the Board. Their failure to do so amounted to an abandonment of their claim. 181 U.S. at 489-491; 265 U.S. at 483-485. Here, in contrast, the State claims that the public trust easement could not have been presented for confirmation, not because it is less than a full fee, but rather because the Board only had jurisdiction over *private* land claims and not *sovereign, public rights*. As to public rights there can be no abandonment. *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836).

[19]The Solicitor General concedes that in *New Orleans* this Court recognized public rights arising under a prior sovereign notwithstanding the earlier rejection of the claim by a Board of Land Commissioners. (Br. for U.S. 19 n. 19.) However, he attempts to distinguish *New Orleans* from the instant case on the grounds that under the confirmatory scheme enacted for Louisiana, that is, the Act of March 2, 1805, the Board merely made recommendations to Congress, and thus rejection by the Board did not amount to a forfeiture of title. *Id.* This is a distinction without a difference, for Congress, on the basis of the Board's rejection, did not confirm the City's claim. Thus the result was the same, the City's claim was rejected by the confirming body — Congress. Had the claim been confirmed there would have been no lawsuit styled *New Orleans v. United States*. It may therefore be said that even though the claim was rejected by *Congress*, this Court still held that the public rights survived. All the more reason to recognize the public rights herein.

Pet.) at 711, 730-731, 733-734. On this basis, the claim was not confirmed by Congress.

Nevertheless, this Court held that because the prior sovereigns had held the land in trust for the City, after cession the land remained impressed with these public rights. And the confirmation proceedings had not terminated these rights even though an unsuccessful attempt had been made to have them confirmed. Rather, the public rights had survived the change in sovereignty and the confirmatory proceedings and were now held by the *State*. 35 U.S. (10 Pet.) at 736-737.

Likewise herein, the public rights in Ballona Lagoon originated under a prior sovereign, survived the change in sovereignty and the confirmation of private titles, and are entitled to the recognition accorded these rights by the state high court.

A further example of the recognition of a public servitude created under the rule of a prior sovereign is found in the case of *Eldridge v. Trezevant*, 160 U.S. 452 (1896). The servitude in that case allowed the State of Louisiana to construct levees across riparian property without compensation to the landowner, and was said to have arisen under the Code Napoleon. This servitude was incorporated into state law and was applied by the State to Mr. Eldridge, a federal patentee. *Id.* at 461-463.

The Court held that, although Eldridge's federal patent (an outright grant of public land owned by the United States unlike the confirmatory patent here) contained no reservation of any kind, Eldridge's title was nevertheless subject to this public right. 160 U.S. at 466-469.

Important to the instant case is that in *Eldridge* this Court acknowledged the difference between a federal patent issued upon an outright grant from the United States and a confirmatory patent, as we have here, and implicitly affirmed the principle that the quality of title possessed by a confirmatory patentee is subject to preexisting servitudes recognized by the State in which the lands are situated.

This is seen from Eldridge's argument that the servitude should not apply to his land because his title was not "derived by grant from Spain or France, or from the State . . . [but] from the United States." 160 U.S. at 466. Thus even Eldridge conceded that had

he been a confirmatory patentee, without question his title would have been subject to the public servitude recognized by the prior sovereign when the grant was made.

So, too, in the instant case, the public trust servitude applies to Summa's title because its existence in Mexico predated the original grant of Rancho La Ballona and its recognition by the State does not detract from that title.

C. Being a Sovereign Right, No Reservation in the Confirmatory Patent Was Required to Preserve the Public Trust.

Since this Court has consistently and repeatedly held that patents issued pursuant to the Act of 1851 were *not* original grants of land but were merely confirmatory of preexisting rights (*Boquillas Cattle Co. v. Curtis*, 213 U.S. 339 (1909); *Adam v. Norris*, 103 U.S. 591 (1880); *Beard v. Federy*, 70 U.S. (3 Wall.) 478 (1865)), the United States confirmatory patent could not have conveyed the public trust to Summa's predecessors as Summa asserts, thereby enhancing and expanding the title that they had received from the Mexican government. (Br. of Pet. 27.)

Indeed, sovereign rights cannot, merely by implication, be conveyed into private ownership under any circumstances. *Montana v. United States*, 450 U.S. 544, 552 (1981).

In making this argument, Summa has failed to distinguish between proprietary and sovereign rights.[20] Unlike proprietary rights, sovereign rights cannot be conveyed into private ownership. As was stated in *Illinois Central Railroad v. Illinois*, 146

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[20]Summa's citation of *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871); and *United States v. Rindge*, 208 F. 611 (S.D. Cal. 1913), for the proposition that sovereign rights could not have been silently reserved in confirmatory patents issued pursuant to the 1851 Act is evidence of its confusion. (Br. of Pet. 28-30.) *Leo Sheep Co.* and the *Rindge* case each involved an easement by necessity, a proprietary right, and in each there was found to be no necessity. 440 U.S. at 679-680; 208 F. at 620-621. In *Pumpelly*, the question was whether lands granted by the United States are protected by the constitutional prohibition against taking without payment of compensation. 80 U.S. (13 Wall.) at 182. None of these cases has anything to do with whether sovereign rights survive the issuance of a confirmatory patent; each is inapposite.

U.S. 387 (1892):

> "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id.* at 453.

So herein, the United States could no more have conveyed the State's sovereign public trust rights in the confirmatory patent to Summa's predecessors than it could have conveyed any of the State's other sovereign rights, such as the police power or the power to tax. For like the police power and the power to tax, the public trust goes to the core of governmental power. This Court so held in *Montana v. United States*, 450 U.S. 544 (1981), when it acknowledged that:

> "[C]ontrol over the property underlying navigable waters is . . . strongly identified with the sovereign power of government[.]" *Id.* at 552.

No one argues that the United States conveyed any other sovereign right of the State in the confirmatory patent, yet the patent contains no reservations of *any* kind. The reason is that sovereign rights, including the State's public trust rights, need no express reservation in order to be retained.[21]

For his part, the Solicitor General takes the position that the sovereign public trust rights of the State were conveyed by the confirmatory patent because not expressly reserved, yet he argues that the federal navigational servitude was *not* conveyed even

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[21]This is corroborated by the purpose for the confirmation proceedings, which was to determine the validity of *private* Mexican titles and their boundaries. 9 Stat. 631 (1851); Pet. App. A108-A114. The government was not involved in determining *sovereign* rights or extinguishing them or affecting them in any way through the issuance of a confirmatory patent and did not do so.

though *not* expressly reserved.[22] Why the two sovereign rights would have a different fate he does not say.[23] (Br. for U.S. 17-19, 29.) The answer is that the two are not treated differently. Both would have survived as a matter of law.

Thus the public trust exists over Ballona Lagoon notwithstanding the issuance of the confirmatory patent.

III.

THIS COURT HAS CONSISTENTLY HELD THAT INCIDENTS OF TITLES CONFIRMED PURSUANT TO THE ACT OF MARCH 3, 1851, ARE TO BE DETERMINED ACCORDING TO STATE LAW.

A. The State Court's Determination of the Incidents of Summa's Title Should Not Be Disturbed Because the Asserted Grounds for Application of Federal Law Have Been Expressly Rejected by This Court.

This Court long ago determined that questions concerning the incidents of a Mexican confirmatory patentee's title,[24] such as those raised herein, are to be resolved by state law because no

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[22]The Solicitor General also states that the public trust easement, so far as related to navigational concerns, "would seem to merge in the federal navigational servitude." (Br. for U.S. 27.) The Solicitor General is incorrect. No matter how similar aspects of the public trust may be to the navigational servitude, there would be no merger, for this Court has held that the fact that a similar regulatory power exists in both the federal and state governments is no basis for asserting that the federal power supersedes or subsumes that of the State. *North Shore Boom Co. v. Nicomen Boom Co.*, 212 U.S. 406, 412 (1909); *Cummings v. Chicago*, 188 U.S. 410, 431 (1903). The public trust would be an a fortiori case. The public trust derives from the inherent sovereignty of the State whereas the navigational servitude derives from the Commerce Clause of the Constitution. The independent origins of the public trust would prevent it from "merging" with the navigational servitude.

[23]Indeed, even CLTA, in its amicus brief, acknowledges that the two sovereign rights ought to be treated the same way, although it arrives at the wrong conclusion. (CLTA Amicus Br. 18, n. 29.)

[24]Incidents of title are all of those rights in property possessed by the owner other than the fee title and the location of the initial boundaries. *Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 784-787, 147 P.2d 964, 970-972 (1944).

federal issues are thereby presented. *Los Angeles Milling Co. v. Los Angeles*, 217 U.S. 217 (1910); *Devine v. Los Angeles*, 202 U.S. 313 (1906); *Hooker v. Los Angeles*, 188 U.S. 314 (1903).

Despite this Court's settled rule, Summa argues that the state high court's findings respecting the incidents of its title, deraigned from a Mexican land grant, are violative of the Treaty of Guadalupe Hidalgo, the Act of March 3, 1851, and the confirmatory patent issued to it pursuant to the Act. (Br. of Pet. 14-31.)

Yet, in *L.A. Milling*, *Hooker*, and *Devine*, this Court had before it precisely the same argument and expressly rejected the Treaty of Guadalupe Hidalgo, the Act of March 3, 1851, and the confirmatory patent as bases for the application of federal law.

Each of these cases, *L.A. Milling*, *Hooker*, and *Devine*, were quiet title actions brought to determine whether a confirmatory patent issued by the United States to a Mexican land grantee pursuant to the Act of March 3, 1851, the grant being absolute on its face, had conveyed Mexican public water rights. In each, it was conceded that fee title to the property was not at issue and that the federal confirmatory patent was silent on this point.

This Court held that the Treaty of Guadalupe Hidalgo did not supply a basis for the application of federal law to determine this question because the determination of the incidents of a Mexican confirmatory patentee's title does not challenge the validity or the meaning of the Treaty. Rather, a court is called upon only to determine the rights existing under Mexican law that the Treaty promised to protect, a state court function. 188 U.S. at 318.

Further, this Court held that the invocation of the Act of March 3, 1851, does not create a federal question in a case determining the incidents of a Mexican confirmatory patentee's title because in such a case neither the validity nor the meaning of the Act is at issue, and more importantly, because the Act did not originate federal rights or titles. The Act merely established the procedure whereby preexisting property rights would be confirmed by the United States. 202 U.S. at 337.

Finally, the existence of a confirmatory patent does not require the application of federal law because the determination of the incidents of a Mexican confirmatory patentee's title does not involve the interpretation of a federal grant. This Court held that

patents issued pursuant to the Act of March 3, 1851, are not original sources of private titles, but are merely confirmatory of rights obtained under the prior sovereign.[25] 217 U.S. at 233.

In the words of this Court:

> "In truth, the questions as to the nature and extent of complainants' titles or rights, [derived from Mexico by virtue of grants to their predecessors and confirmed by the United States through its patent], are not Federal questions, but questions of state or general law.
>
> "In *Hooker v. Los Angeles, supra*, it was contended that the decision of the state court against . . . rights . . . alleged to be derived from a patent of the United States, and confirmed Mexican grants, was a decision against a title, right, privilege, or immunity claimed under the Constitution or some statute or treaty of the United States, and so reviewable here. But this court held otherwise, and we said:
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> " 'Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final. . . .' "[26] 202 U.S. at 337.

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[25]CLTA asserts that *L.A. Milling, Hooker, and Devine* are not applicable in the present context because they were all controversies between competing holders of confirmed Mexican grants over their respective rights in waters, and thus "third persons" as to each other under the Act of March 3, 1851. (CLTA Amicus Br. 15-20.) This argument fails, however, because this Court did not base its decisions on the fact that the controversies were between competing Mexican confirmatory patentees, but rather, as noted above, on an analysis of each of the asserted sources of federal jurisdiction. This Court rejected jurisdiction in all three cases for the same reason urged here; namely, because the validity or the interpretation of neither the Treaty, the federal act nor the confirmatory patent was being challenged and because none created an independent source of title requiring interpretation under federal law. 217 U.S. at 233; 202 U.S. at 337; 188 U.S. at 318.

[26]The Solicitor General asserts that "in more recent cases" this Court has repudiated this line of authority, yet he cites only one case, *United States v. Pink*, 315 U.S. 203, 217-218 (1942). (Br. for U.S. 7 n. 2.) Such an assertion is based on a profound misunderstanding of *L.A. Milling, Hooker*, and *Devine*. In the *Pink* case, the Court merely restated the well established rule that it will review or independently determine all questions on which a *federal right* is necessarily dependent. 315 U.S. at 217. But in *L.A. Milling, Hooker*, and *Devine*, this Court specifically held that there is *no federal right* involved in determining

(footnote continued on following page)

This principle was recently reaffirmed in *Hyman v. State Lands Com'n of State of Cal.*, 543 F.Supp. 118 (C.D. Cal. 1982), *appeal pending*. *Hyman* raised the same issue that is presented here: Whether the public trust exists on tide and submerged lands located within a federally confirmed Mexican land grant. Indeed, the *Hyman* case involved the same La Ballona rancho grant, the same historic Ballona Lagoon, and the same federal confirmatory patent. And plaintiffs in *Hyman* argued precisely as does Summa here that the resolution of the issue requires the application of federal law by virtue of the Treaty of Guadalupe Hidalgo, the Act of March 3, 1851, and the federal confirmatory patent.

The federal district court disagreed and dismissed the case for lack of federal jurisdiction, citing the long-standing precedent of this Court that no federal question is involved in determining the incidents of titles confirmed by the United States under the Act of March 3, 1851. The court stated:

> "Supreme Court precedent, from 1900 to 1977, is controlling here. It is consistent in establishing the principle that no federal question is involved in determining rights to land held privately at the Mexican conquest and subsequently confirmed and patented by the United States." 543 F.Supp. at 122.

Thus the state high court's determination that Summa's title to the tidelands of Ballona Lagoon, having been granted subject to the right of common use, is still subject to those public rights today, is a proper state law decision that should not be disturbed by this Court.

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the incidents of title of a Mexican confirmatory patentee. The *Pink* case did not repudiate *L.A. Milling*, *Hooker*, and *Devine* because these cases specifically address whether the 1851 Act or the Treaty create federal rights and reject this notion, whereas *Pink* merely sets forth a general statement of law that is applicable when a federal right *is* at issue.

B. This Court Has Expressly Distinguished Confirmatory Patents Issued Pursuant to the Act of March 3, 1851, From Patents of the Federal Government of Public Lands Owned by the United States. Incidents of Titles Deraigned From Confirmatory Patents Are Governed by the State and Not the Federal Law.

It was the intention of Congress in framing the Act of March 3, 1851, that the patents issued in confirmation of Mexican land grants be recognized as confirmatory only and not as new grants. For if considered a new grant, the patent would have barred claims of third persons, rather than leaving the title as the Mexican sovereign had granted it. It was therefore the intent of Congress to provide for a quitclaim on the part of the United States in recognition of the fact that the Government was placing itself in the same position vis-a-vis the grantee as the preceding sovereign and was not granting a new federal title. Cong. Globe, 31st Cong., 2d Sess. 371, 428-429 (1851).

Summa fails to understand that this Congressional intent was embodied in the Act of March 3, 1851, in section 15 of the Act (Pet. App. A113), and as a result, patents issued to Mexican land grantees were merely a part of the confirmation proceedings and were not independent or original grants of federal rights. (Br. of Pet. 18-31.) This Court has expressly so held. Quoting from *Adam v. Norris*, 103 U.S. 591, 593 (1880), this Court stated:

> "But the United States in dealing with parties claiming under Mexican grants, lands within the territory ceded by the treaty of Mexico, *never made pretense that it was the owner of them*. When, therefore, guided by the action of the tribunals established to pass upon the validity of these alleged grants, the Government issued a patent it was in the nature of a *quitclaim — an admission that the rightful ownership had never been in the United States*, but had passed at the time of the cession to the claimant[.] . . ."
>
> "It is perhaps *more accurate* to say that the action of the United States in such cases is a *confirmation* rather than a quitclaim." *Los Angeles Milling Co. v. Los Angeles*, 217 U.S. 217, 227-228 (1910) (emphasis added); *accord*, *Boquillas Cattle Co. v. Curtis*, 213 U.S. 339, 344 (1909); *Yeast v. Pru*, 292 F. 598 (1923); *see* 1 S.C. Wiel, *Water*

Rights in the Western States, 279-280 n.-15 (1911) (noting that in *Boquillas*, this Court repudiated *Moore v. Smaw*, 17 Cal. 199 (1861)).

Thus this Court has recognized that the United States was never the owner of lands previously granted by Mexico and therefore was not granting a title by issuing a patent under the Act of March 3, 1851, but merely confirming a preexisting Mexican title.

The Mexican land grant confirmatory patent is thus radically different from a federal patent evidencing an outright grant of public lands owned by the United States. Incidents of titles deraigned from confirmatory patents are governed by the state, and not the federal law. This distinction and its effect was described by the court in *Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 147 P.2d 964 (1944), as follows:

> "[I]f appellant claimed through a federal grant in the proper sense, there could be no doubt that the question involved would be governed by the federal and not the state law. But that rule only applies where title is derived from the United States. *In the present case appellant did not deraign title from the United States at all. The title was predicated upon a Mexican grant.* The issuance of the patent thereafter pursuant to an act of Congress was but confirmatory of the Mexican grant in performance of our government's obligations assumed under the Treaty of Guadalupe Hidalgo. The United States never had the true ownership of the property, and in no proper sense was it the grantor or the source of appellant's title. . . ." 63 Cal.App.2d at 784, 147 P.2d at 970 (emphasis added).

Since the patent in the case at bar is a Mexican confirmatory patent and not a federal grant, it may be categorically stated that the United States never had the true ownership of Ballona Lagoon and in no sense was it the grantor or source of Summa's title. There is thus no basis for the application of federal law herein, and the decision of the California Supreme Court ought to stand undisturbed.

IV.

WHERE THERE ARE REPEATED REFERENCES TO THE EXISTENCE OF BALLONA LAGOON IN THE FEDERAL CONFIRMATORY PROCEEDINGS, IT WAS PROPER FOR THE TRIAL COURT TO CONSIDER EVIDENCE CONCERNING THIS FACT TO SET AT REST ANY AMBIGUITY CREATED BY OTHER STATEMENTS MADE DURING THOSE SAME PROCEEDINGS.

Petitioner seeks to have this Court close its eyes to the physical fact regarding the existence of Ballona Lagoon. It argues that the lagoon was found not to exist in the federal confirmatory proceedings despite its being shown on the plat incorporated in the confirmatory patent and despite repeated references to the lagoon in the description of the rancho finally approved. (Br. of Pet. 31-37.)

The portion of Ballona Lagoon which is the subject of this action is an arm of the sea today and has existed at its present location parallel to the sea and emptying into it for at least 900 years. (Pet. App. A52; J.A. 172-174, 190-193.)

Ballona Lagoon's historic existence cannot be seriously denied. It is described as the "mouth of the estuary" in five affidavits sworn in 1840 and made a part of the espediente for Rancho La Ballona. (J.A. 12-18.) It is depicted on the earliest map of the area, the Hancock survey of 1858, as a portion of the feature Hancock termed an "inner bay," specifically, that portion labeled "inlet" flowing into the sea. (J.A. 26, 170-171, *see also* appendix 1 hereto.) Indeed, since the field notes of the Hancock survey are incorporated into Summa's confirmatory patent word for word, and the Hancock survey plat is also incorporated into the patent, Ballona Lagoon's existence is memorialized in Summa's own patent. (Pet. App. A115-A124.)

The lagoon is also depicted on each of the official surveys of the area conducted by the United States in 1876, 1887, 1896 and 1934. On each of these maps, the subject of this litigation is easily identified as a portion of the long channel open to the sea. As can be seen from these maps, the historic Ballona Lagoon was much more extensive than the Ballona Lagoon we deal with

here.[27] (J.A. 122-125, 171, *see also* appendix 2 hereto.)

At trial the expert testimony of a geomorphologist and a geologist was admitted to prove that the subject of this litigation, the Ballona Lagoon of today, was naturally formed, was and is a part of the Pacific Ocean and thus tidal, and has existed in its present location for at least 900 years. The experts based their conclusions in part on the depiction of the present day Ballona Lagoon on the United States surveys of 1876, 1887 and 1896, photographs of the lagoon and age dating experiments from core samples of the lagoon's subsurface. (J.A. 126-134, 143-156, 162-174, 180-193.)

Significantly, Summa did not object to the admission of this testimony at trial, although petitioner now objects that it was considered, and did not produce any evidence to the contrary. Thus, as a matter of scientific fact, the existence of Ballona Lagoon in the nineteenth century is unrebutted, indeed, unchallenged on the record now before this Court.

Nevertheless, Summa argues that the subject matter of this litigation was dry and suitable for pasturage in 1873.[28] (Br. of Pet. 31-37.) Since the channel is clearly depicted in the United

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[27]In the 1876 Report of the Superintendent of the United States Coast Survey, Ballona Lagoon is referred to as a "large estuary." S. Ex. Doc. No. 37, 44th Cong., 2d Sess. 50 (1876). "Estuary" was defined as ". . . an arm of the sea." Webster, *Webster's English Dictionary* 466 (1864).

[28]Although this case focuses only on the *mouth* of the estuary, the Solicitor General's attempt to bolster Summa's argument based on a confused characterization of the diseño (map) (J.A. 7) must be set straight. The Solicitor General states that most of the estuary ("estero") depicted on the diseño (map) of the rancho is color coded as "grazing" land, suggesting, according to the Solicitor General, "very shallow wetlands of limited salinity." (Br. for U.S. 8.) The Solicitor General cites as authority for this proposition Commissioner Wilson's observation that on the diseño, the "grazing" land is "shaded green and marked 'Tierras de Siembra' (cultivated lands)." (J.A. 32.) A look at the diseño quickly reveals that the grazing land, "Tierras de Siembra" that Wilson was referring to is on the *eastern* end of the rancho, nowhere near the estuary. Thus the Solicitor General is plainly wrong in characterizing the estuary as grazing land and his conclusions about its character cannot be given credence.

States Coast Survey map of 1876, this argument is irreconcilable with reality. A fully developed coastal lagoon system such as that depicted by United States surveyors in 1876 could not have come into existence in just three years.[29]

Summa bases its argument on a misunderstanding of the General Land Office's review of the Hancock survey in the 1800's.

Under the 1851 Act, a confirmed private claim was required to be surveyed before a confirmatory patent could issue. (§ 13; App. Pet. A112.) The Surveyor-General was charged with conducting the surveys required under the Act and certifying them as accurate. *Id.* In compliance with this requirement, a survey of Rancho La Ballona was made by Henry Hancock, Deputy Surveyor, in July 1858. (J.A. 26, 27-31.)

Hancock's survey located on the ground the La Ballona rancho boundaries previously confirmed by the United States District Court. (J.A. 22-23.) When completed, the survey included within the boundaries of the rancho a feature Hancock termed an "inner bay." (J.A. 26.) The field notes describe how Hancock followed the shore of this bay, *crossed the bay's inlet*, and finally came to the shore of the Pacific Ocean. (J.A. 28-29.) It is important to note that it is a portion of this *inlet* that is today known as Ballona Lagoon and that is involved herein. (*See* appendix 1 hereto.)

Hancock's survey was sent to the General Land Office for approval. On March 17, 1860, Joseph S. Wilson, Commissioner of the General Land Office, rejected the survey for, *inter alia*, including the "inner bay." (J.A. 32-34.) Wilson believed that

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[29]The Solicitor General accepts the United States Coast Survey map of 1876 as the most reliable depiction of the mid-nineteenth century lagoon. (Br. for U.S. 10.) However, he is apparently confused about the subject matter of this litigation, for he expresses concern about the existence of salt marsh and mud flats on the map, pointing out that "all the area surrounding the marsh is upland, *except at the bottom of the map, where a water channel intervenes before the barrier beach and the sea.*" (Br. for U.S. 10 n. 8; emphasis added.) He notes that this channel has a low water line. *Id.* Apparently the Solicitor General does not realize that it is *only* a portion of this *tidal channel* at the bottom of the 1876 map that is now before this Court. (*See* appendix 2 hereto.)

the "inner bay" was not depicted on the original diseño. Had there been an intention to include such a feature in the rancho, Wilson wrote, it would have been more particularly described both in the diseño and in the juridical possession. (J.A. 32-33.) Noting that the diseño showed a creek flowing across the western boundary of the rancho, Wilson referred back to the Hancock survey and saw that it showed a creek flowing into the "inner bay." He therefore reasoned that the landward shore of the "inner bay" must have been intended as the rancho's western boundary. (J.A. 33.) Wilson therefore remanded the survey for amendment. (J.A. 34.)

Eight years later the survey had not been amended and no further action had been taken with respect to it. (J.A. 35-36.) It was then determined by the Secretary of the Interior that the Ballona survey came within the Act of July 1, 1864 (13 Stat. 332), and should be readvertised. (J.A. 37, 38.)

As a result of the readvertisement, a protest was filed by the owners of Rancho San Vicente y Santa Monica, the rancho abutting Rancho La Ballona on the north. Their objection was that the northern boundary of the La Ballona survey encroached into their rancho by not correctly locating the "deep gullies," the La Ballona rancho's northwestern corner. (J.A. 39-41.)

Thereafter, Tomás Talamantes and Ignacio Machado, both Rancho La Ballona grantees, submitted their own affidavits and that of Jose del Carmen Sepulveda in support of the Hancock survey. (J.A. 55-60.) The affidavits primarily concerned the location of the points fixing the northern boundary of the rancho, but they also spoke of the "inner bay." The affidavit of Ignacio Machado is illustrative:

> "[A]t this time *nearly* all of the land represented as an 'inner bay' is dry land, and is used as pasturage." (J.A. 60; emphasis added.)

Along with these affidavits, the La Ballona grantees also submitted the affidavit of Henry Hancock. Significantly, although the surveyor was the only person in the position to explain what he meant by "inner bay," his affidavit did not even mention the "inner bay." (J.A. 61-62.) It should be noted that at the time of these proceedings Henry Hancock was the law partner of Charles H. Larrabee, the attorney representing the Rancho La Ballona

grantees. (J.A. 54, 63, 74-75, 117.)

Willis Drummond, successor to Joseph S. Wilson as Commissioner of the General Land Office, reviewed the Hancock survey in a letter dated April 30, 1873, to R. Hardenbergh, the United States Surveyor-General for California. (J.A. 84-94.) In this letter, Drummond mentioned Wilson's earlier rejection of the Hancock survey but *dismissed it as irrelevant* to the proceedings before him.[30] In Drummond's words:

> ". . . What [Wilson's] views were it is not necessary now to examine, for . . . the survey . . . was duly objected to in accordance with the provisions of . . . [the Act of July 1, 1864], and is therefore now before this office, on its merits, *without regard to any opinion expressed by this office prior to said publication*." (J.A. 86; emphasis added.)

Drummond determined that the survey was accurate in its placement of the disputed boundary. Although not necessary to his decision, he then went on to say, on the one hand, that the "inner bay is not an arm of the sea[31] and [on the other hand] that the *mouth of this estero* is wholly outside the present survey of

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[30]Summa and the Solicitor General imply, without foundation, that Hardenbergh's *December* 1873 letter to Drummond discussing Wilson's concerns (J.A. 110-112) somehow influenced Drummond's *April* 1873 letter to Hardenbergh. (Br. of Pet. 33; Br. for U.S. 21-22 n. 22.) Summa can only say that although Hardenbergh's letter is clearly dated December 18, 1873 "the year clearly should have been 1872." (Br. of Pet. 33 n. 37.) This is desperate advocacy. There is nothing to suggest that the letter's date is anything other than that appearing on the face of the letter. Moreover, Drummond surely would have mentioned the views of the Surveyor-General for California if they previously had been conveyed, if for no other reason than to dismiss them as irrelevant, as he had Wilson's concerns.

[31]Drummond's statement was based on the La Ballona grantees' affidavits which they had submitted on their own behalf. (J.A. 55-60, 88-90.) Significantly, in August 1872, Commissioner Drummond determined that such ex parte affidavits were unreliable and insufficient as proof of any matter and would no longer be accepted by the General Land Office. Drummond held that henceforth affidavits would have to be sworn before the Surveyor-General and an opportunity given for cross-examination. Annual Report of the Secretary of the Interior on the Operations of the Department 37-38 (1873).

the Ballona rancho[.]" (J.A. 92; emphasis added.) Drummond added that had anyone objected to the southwest boundary, it "might have been extended, according to the final decree on title to the *mouth of the estero* above mentioned, that is to say to where it *empties into the ocean*." (J.A. 93; emphasis added.) Drummond did not order any changes to be made to the Hancock field notes or plat. The survey was approved as drawn.

On June 9, 1873, the Rancho San Vicente y Santa Monica grantees appealed Drummond's decision to the Secretary of the Interior. (J.A. 95-99.)

On November 19, 1873, Secretary of the Interior Delano issued his opinion. Secretary Delano's opinion *superseded* that of Drummond and constituted the final action on the survey. As was stated in *New Orleans v. Paine*, 147 U.S. 261 (1893):

> "Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review . . . as are the interlocutory decrees of a court open to review upon the final hearing." *Id.* at 266.

Thus it was Secretary Delano's opinion that provided the basis for the issuance of the confirmatory patent for Rancho La Ballona. *Id.*, *see also Knight v. United States Land Association*, 142 U.S. 161, 177-179 (1891).

Secretary Delano considered *only* whether the Hancock survey had correctly located the northwestern and northeastern boundaries of Rancho La Ballona according to the landmarks called for in the Decree of Confirmation. Satisfied that these landmarks were correctly located by Hancock, Secretary Delano approved the survey and plat, including their description and depiction of the "inner bay." Secretary Delano's opinion held:

> "[T]he weight of evidence establishes the correctness of the survey now before me, in its location of the northern (or northwestern) line of the Ballona, according to the decree of confirmation. That decree establishes the boundary in question from point to point by reference to natural monuments, and I am satisfied that these monuments are correctly located by the Hancock survey." (J.A. 100.)

Thus Drummond's intermediate decision was affirmed, but only on the ground of the boundary location and not on the character of the lands shown as an "inner bay" on Hancock's

plat. Neither the Hancock survey field notes with references to the bay, nor his plat depicting the "inner bay" were changed. On the contrary, the patent for Rancho La Ballona incorporated the Hancock field notes with its references to the bay and the plat depicting the "inner bay" as the rancho property description. (J.A. 101-109.)

Summa fails to understand that the character of the "inner bay" was not at issue in the private boundary dispute.[32] Whether the "inner bay" was wet or dry would not have changed the determination of whether Hancock had correctly located the "deep gullies" on the northwest corner of the rancho. Had the objections of the Rancho San Vicente y Santa Monica grantees prevailed, the Rancho La Ballona boundary would have been moved farther south, giving the San Vicente grantees more land and the La Ballona grantees less. As the Solicitor General correctly points out, "The survey was approved for its plotted boundaries, not the irrelevant sketch of an internal feature." (Br. for U.S. 22.)

Summa further fails to understand that throughout the proceedings in the General Land Office it was never stated or held that the feature labeled the "inlet" on the Hancock survey, the only part of the historic lagoon of concern in this case, was not tidelands. For example, the affidavit of Ignacio Machado, quoted by Summa (Br. of Pet. 32-33), states that *nearly* all the land represented by the "inner bay" is dry land. (J.A. 60.) Obviously, Machado knew that some of it was not dry. And Drummond acknowledged that the "*mouth* of the *estero* . . . empties into the ocean."[33] (J.A. 93; emphasis added.) It is this "inlet" and not the "inner bay" to the east of the "inlet" that is the subject matter of this case.

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[32]Even Commissioner Wilson, who would have omitted the "inner bay," would have done so only because he did not see it drawn on the diseño and therefore did not think it was meant to be included within the rancho. (J.A. 33.)

[33]This is consistent with the definition of "estero" given at trial: "an estuary or inlet" (J.A. 138), and the dictionary definition: "a place where the tide ebbs and flows, . . . an inlet of the sea." Pineda, *Nuevo Dicionario, Español e Ingles e Ingles y Español* (1740).

Thus even if the "inner bay" was not an arm of the sea, it does not affect the subject of this litigation, more properly described as "inlet" on the Hancock survey and "mouth of the estero" by Drummond.

However, because of the ambiguity resulting from Drummond's statements read against the patent's incorporation of the Hancock field notes and plat, the state high court held that scientific evidence had been properly admitted at trial to determine the historic character of what is today known as Ballona Lagoon. (Pet. App. A7.) This in no way constitutes an attack on the patent or any determination made in the General Land Office. The admission of such evidence has been specifically approved by this Court:

> "[T]o explain the meaning and extent of a decree is not to attack it for error, but to reconcile all of the descriptive language used to designate the tract title to which is confirmed.
>
> "We are of the opinion that the evidence in question was of probative value [and] that its reception and consideration did not run counter to the rule that the decree of confirmation was not open to attack by reason of erroneous description of the land confirmed. . . ." *Stewart v. United States*, 316 U.S. 354, 363.

Indeed, the testimony received proves this principle, for, as demonstrated below, it reconciled and harmonized Drummond's statements and the Rancho La Ballona patent with respect to the property at issue in this case:

> Dr. Orme: "My opinion is that [this] channel . . . suggested as existing in 1839 and shown in the [Hancock survey in the] 1850's [and on United States maps in] the 1870's, 1880's, is in fact still represented at the present time by the remnant of the channel that lies to the northwest of the entrance to Marina Del Rey, and is *presently designated as Ballona Lagoon*." (J.A. 172; emphasis added.)

Factually in accord is Commissioner Drummond's statement that whereas the "inner bay" was dry, the channel or "mouth of the estero" "*emptie[d] into the ocean*." (J.A. 93; emphasis added.)

The state court's holding that the present day Ballona Lagoon is an arm of the sea thus cannot be said to be a collateral attack on a Land Office determination. Summa's argument to the contrary (Br. of Pet. 31-37) therefore must fail.

V.

UPON STATEHOOD CALIFORNIA RECEIVED SOVEREIGN TITLE RIGHTS, INCLUDING THE PUBLIC TRUST EASEMENT IN THE PORTION OF BALLONA LAGOON HERE IN ISSUE, TO PUT THE STATE IN THE SAME POSITION AS THE ORIGINAL THIRTEEN STATES.

During Mexican sovereignty, the public trust easement in Ballona Lagoon was held by Mexico. After the cession of California to the United States and California's admission to the Union, this sovereign interest passed to the State as succeeding sovereign. The court below therefore correctly identified the State as the holder of the public trust easement over Ballona Lagoon, in accord with prior decisions of this Court respecting state sovereign rights.

In *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845)[34] this Court stated that when new states were formed out of the

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[34]As *Summa* concedes (Br. of Pet. 9), under *Pollard's Lessee*, all sovereign rights in the beds of *tidal* waters accrue to a State upon its admission to the Union. Since we deal here only with *tidal* waters, all sovereign rights (here the public trust easement) in Ballona Lagoon accrued to California on statehood. There is no question that Ballona Lagoon is the type of waters in which States have a sovereign interest. It is not a discrete waterway; it is an extension of the Pacific Ocean. Since the waters of Ballona Lagoon constitute a part of this navigable sea, Ballona Lagoon must also be considered navigable, being as much a part of the Pacific as the open sea and all other coastal tidelands. There is but one Pacific Ocean and Ballona Lagoon is a part of it. *See Packer v. Bird*, 71 Cal. 134, 135 (1886), *aff'd.* 137 U.S. 661 (1891). For this reason no evidence of navigability in fact was necessary and none was presented at trial. However, the State is confident that Ballona Lagoon could meet such a test, being at least six feet deep at mean high tide at midchannel. (Summa points out that the lagoon is one to six feet deep (Br. of Pet. 3), the one foot depth being at the shores.) The following cases would support a finding of navigability in such a situation. *United States v. Holt State Bank*, 270 U.S. 49 (1926); *United States v. Utah*, 283 U.S. 64 (1931); *Oregon v. Riverfront Protection Ass'n.*, 672 F.2d 792 (9th Cir. 1982); *North Dakota ex rel. Bd. of Univ. etc. v. Andrus*, 671 F.2d 271 (8th Cir. 1982) *rev'd on other grounds sub nom. Block v. N.D. ex rel. Bd. of University & Sch. Lands*, 103 S.Ct. 1811 (1983).

federal territories, they were "admitted into the Union on an equal footing with the Original States. . . ." *Id.* at 229. Since that time, the Equal Footing Doctrine has served only one function, to delimit the peripheries of State and national sovereignty by drawing lines forbidding the intrusion of one into the exclusive province of the other. Thus, the Equal Footing Doctrine prohibits the federal government from creating new States that are any less sovereign than those already members of the Union (*Coyle v. Smith*, 221 U.S. 559 (1911), and it serves to limit State intrusions upon national sovereignty. *United States v. Texas*, 339 U.S. 707 (1950).

The Equal Footing Doctrine is not a deed from the United States, such that construction of the Equal Footing Doctrine is necessary in order to determine the extent of the rights acquired by the State upon statehood. It is plainly wrong to insist that an "interpretation" of the Equal Footing Doctrine is required as if it were a grant of land.[35] Rather, this Court has repeatedly held that upon statehood, a State's sovereignty is full and complete:

> ". . . A State upon its admission to the Union, is thereafter upon equal footing with every other State and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by provisions of the Federal Constitution or its own Constitution." *Dick v. United States*, 208 U.S. 340, 350 (1908); *accord, Parker v. Brown*, 317 U.S. 341, 360 (1943); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877); *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 428 (1853); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 719 (1838).

Thus, the answer to Summa's question as to what rights California obtained under the Equal Footing Doctrine has already

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[35] "Grant" implies a choice on the part of the grantor to convey or not to convey. Congress had no such choice since it was powerless to withhold from new States any aspect of the sovereignty held by the Original States. Note, 50 Wash. L. Rev. 777, 786 (1975). The Solicitor General erroneously equates the Equal Footing Doctrine with a federal grant. (Br. for U.S. 7 n. 2, 19, 24.)

been answered:[36] Except for the powers committed by the Federal Constitution to the United States, the States retain their status as sovereigns and under the Equal Footing Doctrine receive all remaining powers, rights, jurisdiction and sovereignty fully and absolutely upon statehood. *Skiriotes v. Florida*, 313 U.S. 69 (1941); Tenth Amendment to U.S. Constitution.

Since under the Equal Footing Doctrine new States obtain full and complete sovereignty and jurisdiction (except for those powers delegated to the United States by the Constitution) upon their admission to the Union, and since the force of the doctrine is exhausted upon a State's admission to the Union, there is nothing about the Equal Footing Doctrine to construe. Under the force of this doctrine, on statehood, California obtained all sovereign rights remaining in the lands within its boundaries, including the public trust rights in Ballona Lagoon. This conclusion is so self-evident that its existence in this case fails to present a substantial federal question. *See Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-371 (1977); *Eldridge v. Trezevant*, 160 U.S. 452, 462-466 (1896); *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 737 (1836); *see* discussion in *Hyman v. State Lands Com'n of State of Cal.*, 543 F.Supp. 118, 121-122 (C.D. Cal. 1982), *appeal pending*.

VI.

THE "TAKING" ARGUMENT ADVANCED BY AMICI CURIAE CLTA AND PACIFIC LEGAL FOUNDATION ("PLF") IS NOT PROPERLY BEFORE THIS COURT AND THEREFORE SHOULD NOT BE CONSIDERED.

In the foregoing sections of this brief, it has been shown that the public trust easement over tide and submerged lands is a reserved public title interest which California holds in its sov-

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[36]Summa's assertion that the State received no interest in tide and submerged lands within Mexican rancho grants under the Equal Footing Doctrine (Br. of Pet. 9-10) is predicated on cases which solely concern the conclusiveness of the underlying fee title of Mexican rancho grantees. In fact, the existence of the public trust easement over tide and submerged lands within a rancho was not even addressed by the cases upon which Summa relies.

ereign capacity. (*See* Arguments I, II, V.) The exercise of such an interest is not a taking. *State of California v. Superior Court* (*Fogerty*), 29 Cal.3d 240, 249, 625 P.2d 256, 261, 172 Cal.Rptr. 713, 718-719 (1981), *cert. denied*, 454 U.S. 865; *State of California v. Superior Court* (*Lyon*), 29 Cal.3d 210, 232, 625 P.2d 239, 252, 172 Cal.Rptr. 696, 709 (1981), *cert. denied*, 454 U.S. 865.

Nevertheless, amici curiae CLTA and PLF argue that the state high court "committed a taking of private property without payment of just compensation" (PLF Amicus Br. 6-13; CLTA Amicus Br. 20-29), an issue not raised by the petition for a writ of certiorari and not raised by Summa in its brief on the merits. The issue is therefore not subject to consideration by this Court. *Teamsters v. United States*, 431 U.S. 324, 374 (1977); *Irvine v. California*, 347 U.S. 128, 129-130 (1954).

It is well settled that this Court confines itself to the grounds upon which the writ of certiorari was asked or granted, the review by this Court being no broader than that sought by petitioner. *Helis v. Ward*, 308 U.S. 365, 370 (1939); *Clark v. Williard*, 294 U.S. 211, 216 (1935); *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 494 (1933).

Apparently, amici curiae are not satisfied with the review sought by petitioner and now attempt to add new questions to this case after the grant of certiorari. This attempt by non-parties is not entitled to this Court's attention. It is improper and should be disregarded by this Court. As was stated in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 325 (1972), "We do not reach for constitutional questions not raised by the parties." *Id.*

On this basis, the "taking" issue, not being properly before this Court, should not now be considered."[7] *F. D. Rich Co. v.*

---

[7]In any event, the argument by amici curiae that the decision of the state court constituted a taking without just compensation (PLF Amicus Br. 6-13; CLTA Amicus Br. 20-29) has no basis in fact or in law. Clearly the state court's confirmation of the public trust did not deprive Summa of something it previously possessed. Rather, the court merely articulated the nature and quality of title always possessed by Summa; it did not cause a change or diminution of that title. Since Summa's title remained the same before and after the decision of the state court, there was no taking. *See Los Angeles Milling Co. v. Los Angeles*, 217 U.S. 217 (1910); *Devine v. Los Angeles*, 202 U.S. 313 (1906); *Hooker v. Los Angeles*, 188 U.S. 314 (1903).

Industrial Lumber Co., 417 U.S. 116, 121 (1974); *J. I. Case Co. v. Borak*, 377 U.S. 426, 428-429 (1964); Rules of the Supreme Court, Rules 21.1(a), 34.1(a), 36.5.

CONCLUSION.

Since this Court has long held that incidents of titles confirmed pursuant to the Act of March 3, 1851, are to be determined according to state law, and since this Court long ago settled that States receive all sovereign rights not expressly delegated to the federal government upon their admission to the Union, there is no basis for jurisdiction in this Court. Respondent State therefore respectfully requests this Court to reconsider its grant of certiorari in this case.

Nevertheless, should this Court determine to reach the merits herein, the decision of the California Supreme Court that petitioner's title to the tidelands of Ballona Lagoon is subject to an easement for commerce, navigation and fishing in favor of the public should be upheld.

Respectfully submitted,

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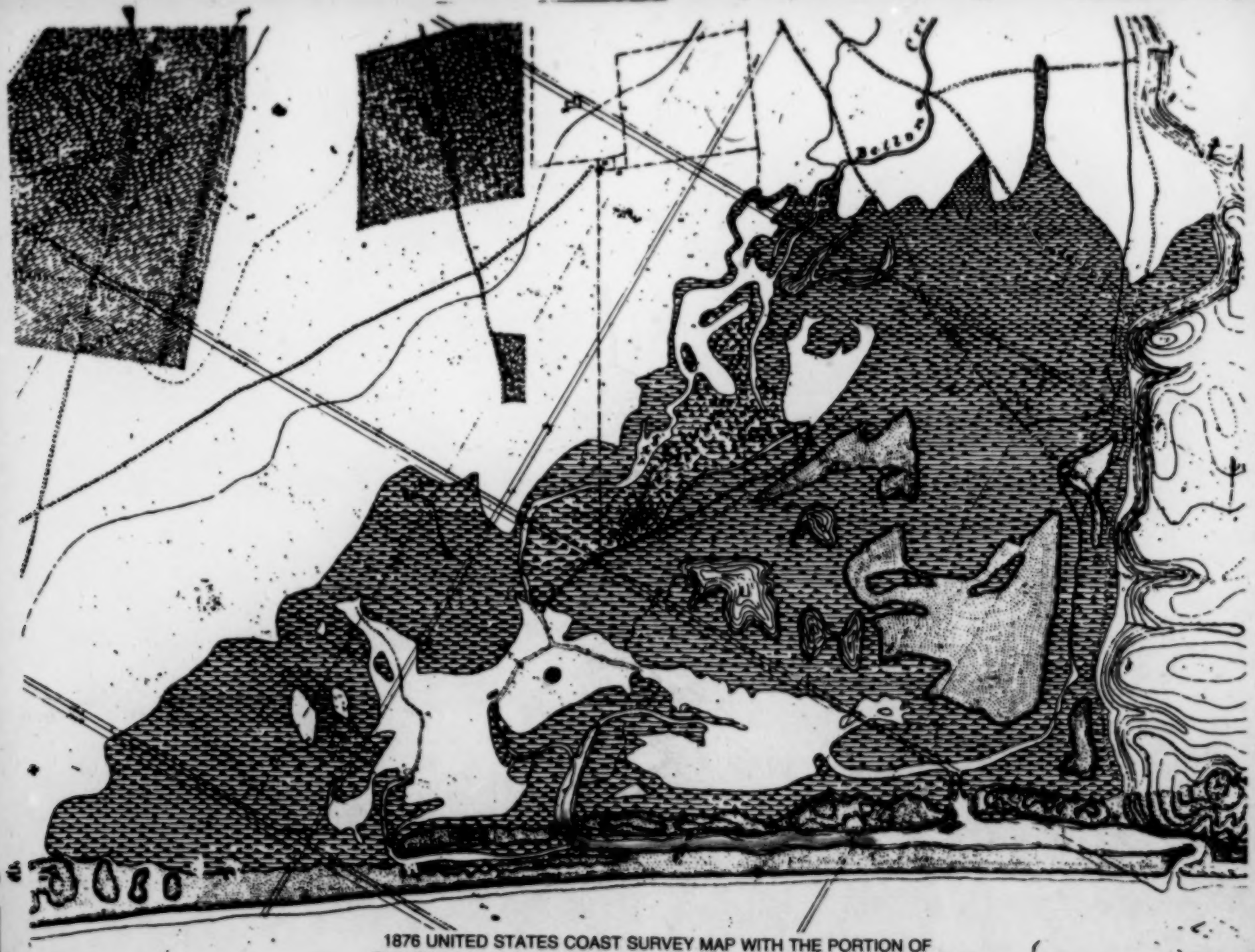
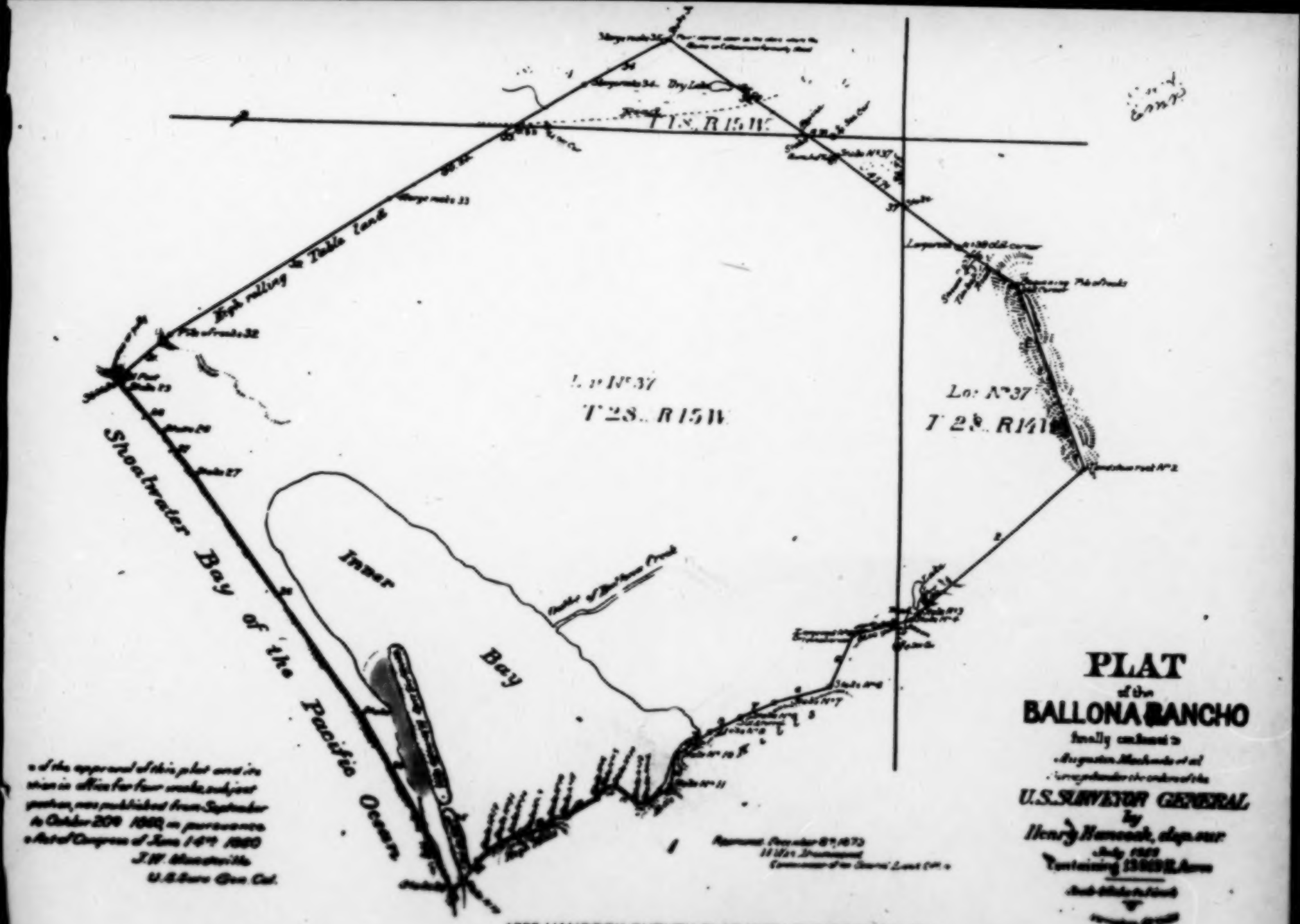
September, 1983.

APPENDIX 1.



1876 UNITED STATES COAST SURVEY MAP WITH THE PORTION OF BALLONA LAGOON WHICH IS THE SUBJECT MATTER OF THIS ACTION SHOWN IN BLUE

APPENDIX 2.



1858 HANCOCK SURVEY PLAT WITH THE PORTION OF BALLONA LAGOON WHICH IS THE SUBJECT MATTER OF THIS ACTION SHOWN IN BLUE

APPENDIX 3.

BALLONA LAGOON, CIRCA 1908.

APPENDIX 4.

NOTE TO CALIFORNIA COASTAL COMMISSION MAPS.

The lines depicted hereon only portrays [sic] a Preliminary Determination of Administration [sic] Jurisdiction to be used as an aid in determining the applicable permit jurisdiction of the local permitting agency or the State or Regional Coastal Commission upon certification of the appropriate Local Coastal Program.

These maps have been prepared to show where the public trust may exist. If an application is received for lands within the outlined area it should be referred to the State Lands Commission for a determination of whether the lands in question are in fact subject to the public trust.

This plot has not been approved by the State Lands Commission and does not establish boundary lines of any State-owned lands depicted thereon.

This plot is subject to change and may not include all lands subject to the public trust. Any questions which arise should be directed to the State Lands Commission.

FILED
SEP 14 1983
ALEXANDER L. STEVAS

NO. 82-708

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES.

Respondents.

BRIEF OF RESPONDENT CITY OF LOS ANGELES

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QUESTION PRESENTED

Whether Congress intended that the confirmation of a Mexican land grant pursuant to the Act of 1851 to Ascertain and Settle the Private Land Claims in the State of California (9 Stat. 631) constitute a determination that public sovereign interest did not exist in the patented land?

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NO. 82-708

IN THE

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SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES.

Respondents.

BRIEF OF RESPONDENT CITY OF LOS ANGELES

STATEMENT OF THE CASE

This case concerns a small watercourse located in the Venice-Marina del Rey area of the City of Los Angeles. The watercourse is an arm of the sea connected and subject to the tides of the Pacific Ocean, and navigable by shallow-draft craft. It was created by forces of nature. (Appendix to Petition, p. A-52. Finding of Fact 1.) Though development has altered much of the area around the lagoon, such work has not substantially affected the portion of the

original lagoon involved in this case. (Appendix to Petition p. A-52. Finding of Fact 2.)

The Ballona Lagoon is a part of the Rancho Ballona, a Mexican land grant patented under the provisions of the Act of 1851 (9 Stat. 631). In a letter by Commissioner Willis Drummond, which was a part of the proceedings leading to the patent, it is said with respect to a portion of the rancho: "The character of this estero, or inner bay . . . is testified to by Tomas Talamantes, Jose del C. Sepulveda and Ignacio Machado, who in substance say it is not an arm of the sea, and *that much of the tract represented as inner bay* is suitable for pasturage," and "this inner bay is not an arm of the sea." [Emphasis added.] (Joint Appendix, p. 92). 1/ This case does not concern the "inner bay." It concerns only the Ballona Lagoon. It concerns only land presently subject to tides and "innundated with seawaters at mean low-tide and mean high tide." (Findings of Fact 1, Appendix to Petition, p. A-52.)

The "inner bay" to which Commissioner Drummond refers is shown on the Survey of Rancho La Ballona (Joint Appendix, p. 26). The "inner bay" is one of two phrases used to describe what appears to be a water area in the survey. The area southwesterly of two small islands is described with the word "inlet."

Petitioners and amici in support of Petitioner have attempted throughout this proceeding to expand the litigation

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1/ Petitioner inaccurately asserts that the California Supreme Court "believed that the "inner bay". . . was an 'arm of the Pacific Ocean' which had continually existed as such for more than 900 years. . . ." (Pet's. Br. p. 8) The quoted language is from the trial court's finding of fact based upon substantial and uncontradicted evidence.

to the entire "inner bay" and/or to other dry land in rancho grants in California. The California Supreme Court, however, expressly refused to decide the status of any other type of land than presently existing tideland. (Opinion, footnote 15, Appendix to Petition, p. A-16.)

Thereafter, Commissioner Drummond decided that the Hancock survey of 1858 was correct, and approved it. Respondents agree that the title of the lagoon is in the petitioner and the other owners. We contend, however, that the title to the lagoon is subject to public easements for navigation and fishing, recreation, and as a source of water for the adjacent and connecting canals.

The Ballona Lagoon has been used as a watercourse for and by the public in the manner and for the period of time necessary to create a prescriptive easement under California law (implied dedication); when the surrounding areas were subdivided the lagoon was delineated as a large lot in the subdivision usable only for waterway, and canals were connected to the lagoon and the lagoon was the source of water for the canals. (Findings of Fact 8, 9, 14 and 17, Appendix to Petition, pages A-53 - A-56.)

In 1965, City of Los Angeles filed an action to quiet title to navigation and fishery easements within the lagoon. This was in order to allow a small craft water system to be built and maintained in the canals, and furnish the owners who would use the system and lenders with a "marketable" record interest in the necessary water access route. The State of California was named as a defendant as required

by California law (Cal. Pub. Res. Code §6308) and answered and cross-complained. 2/

The trial court held that the Ballona Lagoon was subject to public easements, both state owned public trust easements because it was tideland created by forces of nature and also easements owned by "the public" because of the acts of the owners and public occurring during the twentieth century. (Conclusion of Law 2, Appendix to Petition, p. A-59.) The Supreme Court of the State of California affirmed the judgment of the trial court, but considered only the question of whether the lagoon was subject to the public trust easement. It did not discuss or consider the issue of dedication, as all of the dedicated uses "are included within the public trust" (Opinion, Appendix to Petition, p. A-17.) 3/

The petitioner appears to concede that land similar in characteristics to the Ballona Lagoon, and not located in a property originally patented under the Act of 1851, would be subject to the public trust easements. Only the

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2/ At page 6 of its brief petitioner says the City sought "to avoid paying just compensation." Another way of describing the city's objective is that it was seeking permanent assurances that the public could continue to use the lagoon for navigation purposes as it had been doing for many years. To the exent petitioner implies something improper in the City's commencement of litgation, such implication is unwarranted.

3/ Should this Court determine that the public trust easement could not exist in the Ballona Rancho it should remand to the California Supreme Court for decision on whether the Ballona Lagoon is subject to easements created by prescription or implied dedication.

"peculiar" derivation of title causes the Ballona Lagoon to be treated differently than other land in California. 4/ Therefore, the practical question presented in this case is whether a title to land derived from the Mexican government, and confirmed by the Act of 1851, should have different attributes and be subject to lesser burden than land derived from other federal grants and patents. 5/

4/ Pacific Legal Foundation has launched an attack upon the California Supreme Court and apparently seeks to have this court declare unconstitutional all of the recent decisions of the California Supreme Court which are based on public trust theory. It appears to assert the California Supreme Court has committed inverse condemnations by its opinions. We question the authority the foundation cites. Both ***Robinson v. Ariyoshi***, (D.C. Hawaii, 1977) 441 F.Supp. 559 and ***Sotomura v. Hawaii County*** (D.C. Hawaii, 1978) 460 F.Supp. 473 were decisions where the district court, in collateral suits, held the Supreme Court of Hawaii had made erroneous decisions. Your Court had previously denied petitions for writs of certiorari and dismissed the appeals in both cases. (***McBryde Sugar Co. v. Hawaii*** (1974) 417 U.S. 962, ***Sotomura v. County of Hawaii*** (1974) 419 U.S. 872.) No appeals were prosecuted from the district court decrees. The district court does not have appellate jurisdiction over cases arising in the state courts. The decisions are so strange as to not be considered as valid precedent.

5/ Petitioner and its amici repeat over and over that the public trust easment is "broad," "absolute" (Pet. Br. p. 11) and "pervasive" (Brief of Solicitor General, pp. i and 4) the "functional equivalent of title." (Brief of California Land Title Assoc. p. 24.) They are thereby attempting to establish that a public trust easement is title, not an encumbance. In this they are incorrect. (See ***United States v. 11.48 Acres of Land*** (5th Cir., 1954) 212 F.2d 853, 855 in which the court recognized that the United States had an obligation to pay just compensation for taking of a fee simple absolute title in tidelands even though the land was subject to a navigation easement before taking.)

SUMMARY OF ARGUMENT

The argument presented in this brief is in seven parts plus a Conclusion. They are as follows:

1. Congress never intended to change the general rule relating to construction of grants of land from the United States for confirmation of Mexican grants under the Act of 1851. It intended only to make lands in California available for donation to new settlers by separating out the privately owned lands. It was also intended to protect the rights of Mexican owners of land, but to give no new rights. This is clearly established by the statements of the Senators when debating the Act of 1851. The general rule with respect to federal grants of land, applicable to patents under the Act of 1851, is that federal laws control with respect to whether there was a grant and its boundaries. All other aspects of land ownership are determined in accordance with State law.

2. Under Mexican law the owners of Ballona Rancho had no property rights in the water covered areas subsequently confirmed to them. This was established by uncontested expert witnesses at trial. It is also the general civil law rule. Even though water covered lands were included within the rancho boundaries, the public and private rights were not conveyed away, as the grant was "without prejudice" to the traversing roads and servitudes. Though the subject of this action, the Ballona Lagoon, is an important geographic feature now, and if "reclaimed" a valuable property, it was not when granted and confirmed. It was then a minor part of a 14000 acre ranch.

3. The Treaty of Guadalupe Hidalgo, which the Act of 1851 was to implement, was intended only to protect property rights in existence, not to confer property rights in excess of those enjoyed in Mexico. Additionally, it provided that Mexicans would enjoy all the constitutional rights of Americans. Therefore, application of United States or California law to their property, which gives only limited rights to owners of water covered lands, is not a treaty violation.

4. United States law, from at least 1839 to the present, is that once title to real property in a state has passed from the United States, that property is subject to state law. That rule was applied very early to Act of 1851 proceedings in ***Fremont v. United States*** (1855) 17 How (58 U.S.) 542, 565. It was later applied to other Act of 1851 proceedings. Federal law determines only whether title has passed and the boundaries of the land.

With respect to an argument presented by the Solicitor General, the decision in ***United States v. Castillero***, 2 Black (67 U.S.) 17 was that your Court had jurisdiction to determine whether a mineral claim was valid for the purpose of separating the claimed lands from the public lands; it was not a decision that the Court had jurisdiction to determine whether a mineral claim burdened lands already determined to be in private ownership.

5. The description "quitclaim," used in many cases relating to grants under the Act of 1851 is accurate only in the respect that the United States does not warrant title to the property it donates or patents. "Confirmation" is a more accurate term. Donations, conveyances, or patents of land by the sovereign, when given under general laws, do

not convey tidelands or convey them subject to public rights. Under United States law, if applicable, the Ballona Lagoon would be subject to the same public rights found to exist by the California Supreme Court.

6. The petitioners have attempted to expand this case to include land presently not subject to the tides, but filled and improved with buildings. This case involves lands still subject to the tides. California has the authority to determine that such land is subject to a "public trust" easement. Contrary to the assertions of amici, the California Supreme Court has protected private interests in reclaimed tidelands which previously, though incorrectly, were conveyed into private ownership.

7. The decision of the Surveyor General was ambiguous. He described the "inner bay," which may or may not have included the area marked "inlet." The finding of the trial court that the Ballona Lagoon, which is the "inlet," is tideland in its natural condition is therefore not inconsistent with any finding of the Surveyor General. However, in any event, the decision of the Surveyor General, if construed to be a finding as to the existence or non-existence of public rights, was beyond his jurisdiction, and hence could not have a *res judicata* effect.

8. *Conclusion*. The public trust easement, though "broad," is not the equivalent of title. It does not take all the valuable rights of a private owner of tidelands. State law should be applied. Otherwise there are two classes of property in California, one applicable to lands patented by the United States under the Act of 1851; the other applicable to land patented by the United States under other laws.

ARGUMENT

I. The Legislative Intent in Adopting the Act of 1851 was (1) to Separate Lands Already Owned by Private Persons from Those Lands Available for Sale or Donation to New Settlers; and (2) to Preserve to the Owners Their Rights Under Mexican Law but Give Such Owners No Additional Rights Greater Than Would Be Given to Owners of Land in the Other States.

The Act of 1851, "an Act to Ascertain and Settle the Private Land Claims in the State of California," was fully debated in the Senate during the 31st Congress. (It was hardly debated at all in the House of Representatives, which relied upon the full consideration by the Senate.) One of its purposes, expressed over and over again in the debates, was to separate the "private lands from the public domain." (Statement by Senator Ewing, Cong. Globe, 31st Cong. 2d Sess. p. 363.) But this did not mean the Senate intended that the sovereign rights of the United States and the State of California be determined in proceedings under the Act. "Public domain" had and has a very special meaning. That meaning is stated in *Barker v. Harvey* (1901) 181 U.S. 481, 490 as follows:

> "'Public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning in legislation of this country. 'The

> words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' (*Newhall v. Sanger* (1876) 92 U.S. 761, 763.)"

"Public lands," as that term is used in federal legislation, does not include tidelands, and unless a contrary intent is shown general legislation relating to public lands do not extend to tidelands. *Mann v. Tacoma Land Co.* (1894) 153 U.S. 273 involved a claim by the successor of Thomas B. Valentine. Mr. Valentine was a claimant to land in California granted to Juan Miranda by the Mexican government. Valentine's petition for confirmation of the grant was contested, and he withdrew his petition, intending to contest the title of the other claimant, Ortega, after the grant was confirmed. Ortega's claim was rejected, and the land claimed by Mr. Valentine was disposed of "like other public lands." Congress granted him relief (An act for the Relief of Thomas B. Valentine (1872) 17 Stat 649) and Mr. Valentine subsequently established that he was the lawful owner of the California land.

The relief was to allow him to claim an equal amount of land located elsewhere. He did so, claiming certain lands subject to the tides, that is " 'mud flats bare at low water' [which] are overflowed at high water at a uniform depth of from 2 to 4 feet by the waters of Commencement Bay, at the head of Pugent Sound, in Pierce County, state of Washington." (153 U.S. at 275)

His successor, Jacob Mann, sued to stop the land company from trespassing on these tidelands.

Your court affirmed that Mr. Mann did not receive any interest in these tidelands notwithstanding his certificate and claimed right to a patent. The court said at page 284:

> "It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands. There is nothing in the Act authorizing the Valentine script, or in the circumstances which gave occasion for its passage, to make an exception to the general rule. It provided that the script might be located on the unoccupied and unappropriated public lands, but the term 'public lands' does not include tide lands."

This rule of construction of public lands legislation is still in use today. It was utilized ***Montana v. United States*** (1981) 450 U.S. 544, 552 in determining that a conveyance to the Crow Indian Tribe did not include the bed of the Big Horn River.

The Senate was well aware when it debated the Act of 1851 that "public lands" referred only to lands subject to sale. The various senators made it clear that the separation of private from "public" lands was to permit the disposition of the public lands to the residents of California. The debate started out by Senator William H. Gwin from California stating (Cong. Globe, 3lst Cong. 2d Sess. p. 117):

> "There are a hundred thousand American citizens in that country [California] who have no land, and who are anxiously awaiting the determination of the private land claims, that they may settle on the public lands, and avail themselves of the donation or preemption law."

Senator Gwin repeated his statement of the intent of the act. He said later in the debate (Cong. Globe, 3lst Cong. 2d Sess. p. 387):

> "An immense majority of my constituents, and those who by their energy and industry have developed the resources of the country and made California the wonder of the world, have no land. They want homes. I wish to give them homes on the public domain, and that cannot be done until the good claims are confirmed and separated from the public domain, and the bad claims which hang like an incubus over the country, checking the energy and industry of its inhabitants, are rejected and put to rest forever."

This was also the objective of Senators from other states. Senator John M. Berrien, the chairman of the Judiciary Committee, which wrote the bill, said (Cong. Globe, 3lst Cong. 2d Sess. p. 405:)

> "The object is to separate the private from the public domain, with a view on the one hand to leave to individuals, having private claims capable of being ascertained, the undisturbed enjoyment of their property, and on the other to enable the Government to exercise its constitutional power of disposing of the public domain."

The Senate did not intend that confirmation proceedings determine who owned the "private lands," but only to separate them from the "public domain." This is made clear in the comments of Senator Berrien explaining the purpose of the bill. Senator Berrien expressed that he had

acquiesced in the view of some senators to leave the decision as to conflicting "private claimants" to the decision of the State tribunals, and concluded that the issuance of the patent would not decide that question. He said (Cong. Globe, 3lst Cong. 2d Sess. p. 359):

> "Thus if the legal title was vested in the United States, and the patent should emanate, the legal title would be transferred to the patentee; but if a better equitable title existed in another, that patentee would hold the legal title as a trustee for such other person."

Senator Berrien repeated this thought again (Cong. Globe, 3lst Cong. 2d Sess. p. 373):

> "The decision by the provisions of the law, operates only in favor of the real owner of the property; the decision is only established between the claimant and the United States, where the portion of the territory has been severed from the public domain, and the question of individual right is left open."

As we read the record of the Senate debate, the purpose of Section 13 of the Act of 1851 was to establish that the United States had the right to donate its land to the residents of California; lands to which claims had been rejected and lands not claimed within two (2) years were available for settlement by the new residents of California. When claims were allowed, such only established that the

patented lands were not public, but not the true or various ownership interests in them. 6/

The rights of private persons and the public to title, or to use of the patented areas, if there were such rights, continued to exist.

The other purpose of the act was to preserve to the Mexican grantees or other successors the rights they had under Mexican law and to give them the same rights as those enjoyed by the citizens of other states. This intent was also expressed several times in the debate. Senator Dawson said (Cong. Globe, 3lst Cong. 2d Sess. p. 389):

> "Let us pass no law to secure any class of men in the possession of their property. Let their titles be investigated according to the laws of Mexico, under which these people lived, and our own treaty."

"Senator Clay said (Cong. Globe, 3lst Cong. 2d Sess. p. 390):

> We are not to introduce new rules of property in behalf of the inhabitants of California, extending their land and enlarging their possessions.

6/ The cases of *Barker v. Harvey* (1901) 181 U.S. 481 and *United States v. Title Ins. Co.*, (1924) 265 U.S. 472 seem to be entirely at odds with the statements of Senator Berrien. To the extent the court determines that the opinions have relevance to this case, they should be overruled. The legislative history shows there was no intent to foreclose any person from claiming title or other interests against the patentee of a Mexican grant. This contention is fortified by the actions of Mr. Valentine described in *Mann v. Tacoma Land Co., (supra)*, 153 U.S. 273. He believed that if a rancho was patented to Ortega he could try the validity of Ortega's title as against his (Valentine's) title in the state court. This plan failed, however, because Mr. Ortega's claim was rejected, and the lands thereafter were disposed of by the United States.

> "We are bound to secure to them, by the treaty made with Mexico, exactly that property to which they are entitled by the laws of the country, whether Mexico, Spain or California, under which that property has been held."

That the Mexican grantees were not to be given an advantage over other citizens was declared quite forcefully by the senators. Senator Foote declared (Cong. Globe, 31st Cong. 2d. Sess. p. 376):

> ". . . I am unwilling to do more for the people of California than for the people whom I and other senators here represent."

Senator Berrien, also speaking on a proposed amendment to allow occupants of land to prove their title by evidence of occupation for a long period of time, which amendement he opposed, said (Cong. Globe, 31st Cong., 2d. Sess. p. 375):

> "Now, this law of prescription between individual and individual, which it is sought to introduce into this bill, would have given to the citizens of California a right which they would not have enjoyed under their own Government, if that Government had continued over them, and it would have given them a right which other citizens of the United States had not enjoyed as it relates to the United States."

The senator then went on to explain that the Judiciary Committee unanamously rejected giving to grantees of Mexican land more rights or privileges than they had under

either Mexican or United States law. The amendment was defeated. 7/

In adopting the Act of 1851 the Congress was not creating a new system of laws for the special benefit of grantees from Mexico in California. Senator Berrien explained (Cong. Globe, 31st Cong. 2d. Sess. p. 349):

> "The committee . . . have desired to offer a mode of proceeding similar to that which has been adopted in other cases of cessions of territory to the United States. The object of this proceeding is to separate the public from the private domain. . . . We have endeavored to walk in the steps of our predecessors."

We submit that the intent of the Act of 1851 was to give no more to Mexican grantees than to other citizens, consistent with protecting the property rights the Mexican grantees had received from their government. To the extent that general United States law and State of California law would not detract from property rights secured under Mexican law, such law is fully applicable to land titles derived from Mexico.

7/ At page 16 of his brief (Footnote 14) the Solicitor General "deems frivolous" the suggestion by the California Supreme Court that the United States would not convey to its own citizens lesser rights than it would convey to grantees from Mexico. Such disrespect for the California Supreme Court is unwarranted, even though the Solictor General disagrees with that court's opinion. Further, the California Supreme Court's opinion is certainly in harmony with the expressions by at least two senators that Californians get nothing more than the citizens of the other states.

2. Under Mexican Law the Title of the Grantees to Ballona Rancho Was Subject to Public Servitudes Which Previously Existed in Portions of the Rancho.

Finding No. 7 (Appendix to Petition, p. A-53-A-54) states that while subject to Mexican sovereignty, and under Mexican law, the grantees of the Ballona Rancho had no property interest in the Ballona Lagoon. This finding was based upon uncontested evidence, the testimony of Senor Federico Laffan, an attorney in practice in Mexico City, a witness called on behalf of Petitioner, Summa Corporation, and the testimony of Mr. Earl Weisbaum, an attorney at law and the foreign law librarian of the Los Angeles County Law Library, called by the City of Los Angeles. Much of their testimonies is reported at pages 194-223 of the joint appendix. We quote from Senor Laffan's testimony, petitioner's witness, elicited by petitioner's attorney. It is quite positive that under Mexican law no private property interest could exist in a body of water.

> "Because the applicable law which is the Las Siete Partidas states very clearly and in a limited way that running bodies of water, bays, the sea are not subject of private domain. That is to say that they are of the public domain, with the implication - if I may add - that the sovereign has no power to convey a property interest in such bodies of water." (Joint Appendix p. 223.)

This testimony by Senor Laffan is fully in accord with the statement of United States courts on the subject of civil

law and Mexican law. The California Supreme Court has said in ***Lux v. Haggin*** (1886) 69 Cal. 255, 316:

> By the Mexican law, the property in rivers pertained to the nation, the use to the inhabitants."

The United States Court of Appeal stated in ***Humble Oil & Refining Co. v. Sun Oil Company*** (5th Cir. 1951) 190 F.2d 191, 194:

> "Under the civil law, from the Institutes of Justinian until the present time, the seashore has been common property, and the alluvion that was added thereto belonged to the owners whose land was bounded by the sea. This precept of the Roman law remains today as the guiding principle in both civil and common law jurisdictions unless changed by code or statute. Thus the seashore is no part of the land but always an adjunct of the sea."

Petitioner in its brief contends that the limitations of Mexican law are irrelevant in this case because of the alleged "conclusiveness of the 1851 Act proceedings" (Pet. B. p. 16 n. 25). Only the Solicitor General asserts that the civil law would not have been applicable to the Ballona Lagoon. He does this on the authority of a case involving Spanish law in the Phillipine Islands (***Jover y Costas v. Phillipine Islands*** (1911) 221 U.S. 623.) But even if a decision on a Phillipine Islands land grant is applicable to this case, the case does not stand for the proposition that tidelands could be freely conveyed under civil law. ***Jover*** involved a grant of "marshy waste land" (p. 628) ***and no other land***. It was made on the express condition that the

land be reclaimed ("filled in") and during a 20 year period, one-third of the land was filled. Of such a grant, and of the law of Spain, this court said (p. 633):

> "Law 3 and 4, Title 28, Partida, 3 which affirm that the sea and its shore are among the things which are common to all men . . . did not forbid the granting of tidelands *for purposes of reclamation and improvements.*" [Emphasis added.]

Certainly, a common rancho grant, consisting of mainly high ground, could not be construed as having as its purposes "reclamation and improvement" of the Ballona Lagoon. Certainly such alleged purpose has not been satisfied - the Ballona Lagoon is water covered to this date. 8/

The petitioner, as well as amici in support of its position, take the view that the provision of the Mexican grant that enclosures are to be "without prejudice to the traversing roads and servitudes" cannot support a conclusion that the grant was subject to "reserved" public rights. Petitioner says: "Such a broad public property interest was plainly not withheld by the standard stipulation." (Pet. Br. p. 16 Ft nt 25.) In making this comment, petitioner ignores that the entire "inner bay" was approximately 2000 acres out of

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8/ The Solicitor General suggest that the Mexican government officials did not always adhere to the law (pp.12 and 13). Neither did the officials of the United States government always do so. (See *Wilcox v. Jackson* (1839) 13 Pet. (38 U.S.) 498 where the land office register issued a certificate granting Fort Dearborn, an active army post, into private ownership.) It must be presumed that the Mexican courts would no more honor such a purported conveyance then would this court, which have held them to be void.

approximately 14000 acres (Joint Appendix, p. 32) (14.28 percent); and the Ballona Lagoon is only a small portion of the "Inner Bay." *The reservation did not and still does not take all the value of the Rancho*, but only a small portion of it, if any. In this respect it is no different than roadways — which involve an exclusive public use of the surface of a small portion of a parcel. This court has indicated that roads survived the grant and patent procedure (***Barker v. Harvey*** (1901) 181 U.S. 481, 499). The waters are not different, in kind or in quantity. Though a road easement or a "public trust" easement substantially diminish the private values and usefulness of the land they physically occupy; they are a benefit to the unencumbered remainder. 9/ The adjacent and nearby lands have value only because of accessabilty to roads and/or waterways.

California Land Title Association also ignores that only a small percentage of the ranch is, or ever was, water covered. "Vast areas of federally-patented Mexican Lands" are not affected by the opinion of the California Supreme Court, only those which are still subject to the tides in their natural condition.

Both Petitioner and the Solicitor General also assert that the servitude reservation has been held to be inapplicable to tidelands, citing ***United States v. Coronado Beach Co.*** (1920) 255 U.S. 472, 485. They miscite the case. Your court held that this reservation did not justify the taking of all of

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9/ The Solicitor General appears to suggest that "a right to traverse on this land" is not, or cannot be, a public right. He is wrong. (Footnote 13, p. 14) The Solictor General's argument, if correct, would mean that the famous "Camino Real" between San Diego and San Francisco was a trespass.

North Island under a law of Mexico allowing the government to take lands for public buildings. The court did not use the phrase at all with respect to whether the United States had to pay compensation for taking a *fee interest* in the patented tidelands.

By the above argument we seek to establish that nothing would have been taken from the Mexican grantees if the Ballona Lagoon and other portions of the "Inner Bay" had been excluded in the patent. Nothing is taken from them and their successors by applying the law of the United States or of California to petitioner's title.

3. The Treaty of Guadalupe Hidalgo (1848) 9 Stat. 922) Was Not Intended to Enhance the Rights of Mexican Grantees in Their Land.

We have pointed out that the intent of the senators when adopting the Act of 1851, as expressed in debate, was to "secure [to the Mexican grantees] exactly that property to which they are entitled by the laws of [Mexico]." (Statement by Senator Clay, supra). This was the Senate's opinion of the duties of the United States under the Treaty of Guadalupe Hidalgo. We believe this construction of the treaty is correct.

Article VIII of the Treaty provides in part: "[P]roperty of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it

guaranties equally ample as if the same belonged to citizens of the United States." (Appendix to Petition, p. A-96). [10/] Nothing in Article VIII states or implies that Mexican property would have greater rights in California than granted either by Mexican or United States law. All that was intended to be changed was the government - the nation. Your court so stated in ***Knight v. United Land States Association*** (1891) 142 U.S. 161, 200-201 as follows:

> "Jurisdiction and sovereignty passed from one nation to the other by the cession, but not private rights of property; *their ownership remained as under the former government* . . . 'In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away.' " [Emphasis added.]

4. The Rights and Duties of Owners of Land Patented Under the Act of 1851, and the Incidents of Title in Such Land, Is Governed by State Law.

We believe we have established that Congress did not intend to confer any special rights or privileges upon the

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10/ An argument may be made that the "inviolably respected" provision applied only to property of Mexicans who did not reside in California. As to residents of California, they were guaranteed the rights - property and otherwise - of United States citizens. We do not, however, make this argument, as we are confident that application of United States or California law to the Ballona Lagoon tidelands does not impair any Mexican property rights.

owners of land patented under the Act of 1851 or on the land itself. It intended, consistent with treaty obligation, that the people of California receive no more than the people of other states. Congress intended that the general rules of real property law apply to Mexican grantees.

The major general rule of United States real property law is that the law of the state in which the property is located establishes the incidents of and limitations to real property titles. This was the federal law in 1851, as declared by your court in *Wilcox v. Jackson* (1839) 13 Pet. (38 U.S.) 498, 517:

> "We hold the true principle to be this, that whenever the question in any Court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

That rule was repeated in *State Land Bd. of Oregon v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 377. It was also repeated but held not applicable in *California v. United States* (June 18, 1982) 457 U.S.____ [102 S.Ct.

2432], relating to whether the boundary of federally owned land moved as accretions occurred. [11/] Federal, rather than state law, was utilized to decide ***California v. United States*** because (1) The issue was one of boundary of the federally owned land and (2) The federal government was the litoral owner (See concurring opinion by Mr. Justice Rehnquist).

Thus, though not citing authority, your Court was following the ***Wilcox v. Jackson*** precedent when it held in ***Fremont v. United States*** (1855) 17 How. (58 U.S.) 542, 565:

> "In relation to that part of the argument which disputes his right, upon the ground that his grant embraces mines of gold or silver, it is sufficient to say, that under the mining laws of Spain, the discovery of a mine of gold or silver did not destroy the title of the individual to the land granted. ***The only question before the court is the validity of the title.*** And whether there be any mines on this land, and if there be any, what are the rights of sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court by the act of 1851." [Emphasis added.]

That issue was later decided in a state court proceeding terminating in ***Moore v. Smaw*** (1861) 17 Cal. 199 utilizing State common law.

11/ In that case your court decided that federal law is to be utilized when boundaries are at issue. You said: "We reaffirm today that federal law determines the *boundary* of oceanfront lands owned or patented by the United States." (102 S.Ct. 2441) [Emphasis added.]

A later statement of the rule was made in *California Powder Works v. Davis* (1894) 151 U.S. 389, 395; quoting from *Phillips v. Mound City Land & W. Assoc.* (1887) 124 U.S. 605, 610:

> "Article VIII of the treaty protected all existing property rights within the limits of the ceded territory, but it neither created the rights nor defined them . . . Neither was any provision made as to the way of determining their existence. All that was left by implication to the ordinary judicial tribunals."

On the authority of *California Powder Works*, among other cases, it has been held that the federal courts have no jurisdiction to determine the existence or nonexistence of water rights in land patented under the Act of 1851. In *Crystal Springs L. & W. Co. v. City of Los Angeles* (S.D. Calif. 1897) 82 F. 114, affirmed in *Crystal Springs L. & W. Co. v. City of Los Angeles* (1900) 177 U.S. 169, the district court said (p. 117):

> "Where the parties claim under Spanish or Mexican grants, confirmed and patented by the United States, and the controversy is only as to what were the rights acquired by the parties respectively, or their predecessors in interest, under the Spanish or Mexican governments, it being conceded that the rights so acquired, whatever they may have been, were included in the confirmation and quitclaimed through the patent of the United States, *federal jurisdiction does not exist*; and it is immaterial whether such rights were acquired through the original grants or transactions subsequent thereto." [Emphasis added.]

See also *Devine v. City of Los Angeles* (1906) 202 U.S. 313, 337.

These statements of jurisdiction are fully in accord with the intent expressed by the senators in the debates on the Act of 1851.

The Solicitor General suggests that this court has overruled these holdings of limited federal jurisdiction by its decision in *United States v. Castillero* (1862) 2 Black (67 U.S.) 17, 166-169). We believe the Solicitor General has confused a case where a person was claiming title by reason of his discovery of minerals with one where there is an objection that there could be no private title because of the existence of minerals. The majority of the court in *Castillero* points out that the claim is not only for the minerals, "but it also embraces, if necessary to the working of the mine, a right to the exclusive possession and use of the surface of the land for an indefinite period . . ." The court went on to say that though minerals were "regarded as severed from private land" by the usual conveyance "for agricultural or other ordinary purposes" (p. 166) they are still capable of being granted by the Crown, with the possible exception of "royal mines." Hence, a mineral right was "land." In no way may the decision be construed as an assertion that the federal court had jurisdiction when one claimed a mineral interest in another's land. A fuller explanation of this distinction is contained in the opinion of the district judge, which was included in Justice Wayne's dissent. The district judge points out at page 233:

> "It will be seen that the only question before the court was whether the fact that mines of gold and silver had been discovered on land which had

> been previously granted under the Colonization Laws, destroyed the title of the individual to the land granted. It was, of course, held that it did not. Whether there were any outstanding rights of sovereignty in such mines, and if so, what was their nature, and in what sovereign they were vested, the court declared itself without jurisdiction to determine.
>
> "But it was not decided, nor could it have intended to be decided, that a private grantee of a mine under Mexican law could not present his claim for confirmation under the Act of 1851."

Neither this court nor the district court perceived they were overruling *Fremont* by their respective opinions. The Solicitor General is in error in his claim.

We submit, as we have done before, that the decision in this case is a state court and state law matter, presenting no substantial federal questions, either under general federal property law or under the cases construing the Act of 1851.

5. The Patent Under the Act of 1851 Was a "Quitclaim" Only in the Sense that the United States Did Not Warrant the Title of the Patentee. Properly Construed, It Is a Confirmation of Previously Existing Title. As Either a "Quitclaim" or "Confirmation" It Did Not Pass Sovereign Rights.

The Petitioner and amicus California Land Title Association both cite the numerous cases decided by your court and the California Supreme Court holding that *title* to tidelands passed from the United States by a patent, and therefore California did not succeed to such *title*. Because of the use in many of these cases of the word "quitclaim" (See ***Beard v. Federy*** (1866) 3 Wall (70 U.S.) 478.) they assert that all rights of the United States passed to the grantee. "Quitclaim," if so construed, is a misdescription of the effect of the patent. As stated in ***Boquillas Land & C. Co. v. Curtis*** (1909) 213 U.S. 339, 344:

> "But, while it is true that in ***Beard v. Federy, supra***, Mr. Justice Field calls such a patent a quitclaim, we think it rather should be described as a confirmation in a strict sense . . . It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign, it intends or purports to enlarge the grant."

Justice Field would have agreed with this statement. He said, speaking for this court in ***Illinois Central Railroad Co. v. Illinois*** (1892) 146 U.S. 387, 453:

> "General language sometimes found in opinions of courts expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases."

This court has recognized the qualified and limited title granted by a prior sovereign to tidelands. Such grant

conveys a title subject to the public right of navigation and the right to improve and use such tidelands. (***Lewis Blue Point Oyster Cultivation Co. v. Briggs*** (1913) 229 U.S. 82, 87-88.) When the tidelands were not granted by a previous sovereign, but by the United States the rule is: "A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States." (***Montana v. United States*** (1981) 450 U.S. 544, 552,) This rule is so firmly established in our law that your court said in ***Shively v. Bowlby*** (1894) 152 U.S. 1, 57:

> "The United States, while they hold the country as a territory, having all the powers both of a national and of municipal government, may grant, for appropriate purposes, title or rights in the soil below high water mark of tide waters. But they have never done so by general laws: . . ."

This court held in ***Illinois Central Railroad Co. v. Illinois*** (1892) 146 U.S. 387, 453-460 that the State of Illinois could not grant navigable waters constituting the Chicago harbor free of a public navigation right. Though Congress may be able to grant navigable waters free of trust, it should not now - for the first time - be presumed to have done so by a "general law."

Though the Ballona Lagoon may not be navigable in the federal sense, it is tideland. It was a part of the Pacific Ocean in 1848 (see Finding 1, Appendix to Pet. p. A-52)

and it still is, being subject to the tides. The works of man in the vicinity has not substantially affected it.[12/] We do not believe that the Act of 1851 can be construed as authorizing the conveyance of all public rights in its waters or its use.

If federal law were controlling in this case, the result would be the same as that reached by the California Supreme Court.

6. This Case Involves Tidelands Presently Submerged, Not High Ground, Not Homes Nor Businesses.

Throughout the appellate process of this case, the petitioner and amici in support of petitioner have sought to expand the issues beyond those presented. They have been unwilling to litigate whether the public retains a right in tidelands included in a Mexican grant *which are still tidelands.* They have raised the specter over and over again of persons losing their homes and businesses. In the briefs filed herein, petitioner says at pages 10 and 11 of its brief "The 'public trust' property interest is held to exist by virtue, not of the present condition of land, but its historical character as tidelands in 1850 . . ." At page 12, it says: "It accordingly permits the State to utilize non-navigable and even dry land to the exclusion of the 'fee' owner." Amicus

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12/ The Solicitor General, in a rather confusing footnote (Ftnt. 9, pp. 10-11) somehow concludes the lagoon has been dredged. Nothing in the findings justifies such an assumption. The findings are that the lagoon was "created by the forces of nature;" tidal influence was "protected and sustained," not "created." (Appendix to Pet. p. A-52.)

California Land Title Association speaks of "private marinas, single-family residence, high-rise condominiums, office buildings and commercial complexes." (p. 6).

As we point out above, only presently water covered land is involved in this case. The California Supreme Court refused to apply it to dry land or to advise what its ruling would be if a litigation were commenced involving reclaimed wetlands. But, it should be noted that the California Supreme Court has not in the past simply ignored the private expectations of owners of such lands. In *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 91 Cal.Rptr. 23, 476 P.2d 423 the court said that the state and city were estopped to assert that certain tidelands to which the state originally held title still belonged to it because: ". . . ever since the development of the area began shortly after the turn of the century the state and (after annexation in 1923) the city have conducted themselves relative to the Section 2 (a) lands as though the said lands were private property wholly free from trust claims. In reliance upon this conduct thousands of citizens have settled upon these lands with the same expectations as citizens settling on other lands within the city." (p. 499) In *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 162 Cal.Rptr. 327, 606 P.2d 362 the California Supreme Court was faced with the question of how to treat tidelands which had been conveyed by the state in 1870, and still preserve private investment and honor private expectation. It did this by balancing the public and private interests; holding at pages 534-535:

> "Properties that have been filled, whether or not they have been substantially improved, are free of the trust to the extent the areas of such parcels

> are not subject to tidal action. Tidelands that have been neither filled nor improved are not only the most suitable for continued exercise of trust uses, but because there is only a remote likelihood that these parcels may be filled [citations] the economic loss to the grantees of such lots is speculative at best and is clearly outweighed by the interests of the public."

It should be noted that one of the findings of the trial court is: "5. The Ballona Lagoon and the waters of the Ballona Lagoon are of scenic value to the community and enhance the aesthetics and value of adjacent properties . . . Properties adjacent or near the Lagoon have value and usefulness in excess of those separated from the Lagoon by distance." (Appendix to Petition, p. A-53.) Petitioner, by seeking to deny the right of the public to maintain - and perhaps improve - the lagoon are denying the right of their neighbors to continued enjoyment of the lagoon and its value. These neighbors are also successors to the patentees of the Ballona Rancho.

The State of California, and this includes its judicial system, has the authority "to define 'property' in the first instance." (***Pruneyard Shopping Center v. Robins*** (1980) 447 U.S. 74, 84.) This power is limited by the "taking" clause of the Fifth Amendment. But it is a broader power than that possessed by the United States. (See ***Kaiser Aetna v. United States*** (1979) 444 U.S. 164.) The petitioner and amici recognize and accede that the state may fully regulate the use of the Ballona Lagoon and its waters, including, we perceive, to prevent any economic use of them should this be in the public interest (See Solicitor General's brief,

p. 29.) It is hardly a taking of any magnitude, if at all, for the California court to say that the lagoon and its waters may also be used - in an affirmative sense - for public trust purposes as well as preventing inconsistent private uses.

Amici California Land Title Association and Pacific Legal Foundation accuse that the California Supreme Court "cannot reasonably be expected to exercise self-restraint" (Land Title Assoc. Brief, p. 12) and the court will continue to expand the public trust doctrine in "a sense of euphoria in its excitement" (Pacific Legal Fnd. Br. p.12). These are not only attempts to amici to litigate some future case, not this one, their predictions of the future are not borne out by the past actions of the California Supreme Court. The California Supreme Court has sought to preserve public rights in tidal and water covered properties against new incursions; it has not sought to take back that which was given and thereafter utilized.

7. The Ballona Lagoon Was Not Found by Commissioner Drummond to be "Pasture Land." Even if it Was Such, a Finding and a Conclusion That the Land Was Not Subject to Any Public Rights Was Beyond His Jurisdiction.

Again, we point out that this litigation concerns the "Ballona Lagoon," which, at most, is only a part of the "Inner Bay," and perhaps may not be a portion of it at all. The Plat of the Rancho Ballona prepared by Henry Hancock (Joint appendix, p. 26) shows an area marked

with the words "inner bay" separated from the "inlet" by two islands. The "inlet" represents the area now known as the "Ballona Lagoon." (See exhibit to Solicitor General's brief.) Commissioner Drummond states "This inner bay is not an arm of the sea." (Joint appendix, p. 92.) The phrase "inner bay" is ambiguous, it may or may not include the "inlet." This ambiguity is further increased because the testimony relating to the "inner bay" is that "*much of the tract* represented as inner bay is suitable for pasturage." [Emphasis added.] For this reason, in addition to the ambiguity discussed by the California Supreme Court (Appendix to Petition p. A-7), the statements in Commissioner Drummond's decision are not binding as a determination of the character of the Ballona Lagoon.[13/]

It is our primary position, however, that the description of the geography of the Ballona Rancho contained in Commisioner Drummond's letter is not a part of his decision. The matter before the commissioner was the location of the boundaries of Rancho Ballona. Only the boundaries of the rancho were in dispute. The only real concern about the nature of the "inner bay" was expressed by Commissioner Wilson (Joint Appendix pp. 32-34), who would have extended the boundaries of the rancho to include an additional 2000 acres, something that no one wanted. The description of the inner bay, whether an accurate or

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13/ Whether the statement would be *res judicata* in a litigation involving the "inner bay" located north easterly of the islands is not a question for this case. The "nine-tenths of Hancock's 'inner bay' [shown] as salt marsh and mud flats" (see Solicitor General's Brief p. 10) are not a part of this litigation.

inaccurate description, would not affect the location of the boundaries of the rancho. Such comments do not have a res judicata or collateral estoppel effect. "The principle of res judicata does not apply to points which come under consideration only collaterally or incidentally," (*Norton v. Larney* (1925) 266 U.S. 511, 517).

Further, a decision beyond the jurisdiction of an administrative officer has no *res judicata* effect. The finality of a decison of the General Land Office "proceeds upon the assumption that the matter determined is within the jurisdiction of the Land Department." Whether or not the matter is within the department's jurisdiction is a judicial decision. (*Borax Consolidated Ltd. v. City of Los Angeles* (1935) 296 U.S. 10, 17-18)

It is not unprecedented for persons to argue that decisions are final, regardless of the jurisdiction of the body rendering the decision. This argument was made with respect to a United States grant of land in *Wilcox v. Jackson* (1839) 13 Pet. (38 U.S. 498. At page 511 the court discusses the argument that the issuance of a "claim of preemption" to an army fort was "conclusive and irreversible" as the statute did not allow an appeal from the decision of General Land Office register. Of this argument the court said:

> "This proposition is true in relation to every tribunal acting judically, whilst acting within the sphere of their jurisidiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, so long as it is unreversed. But directly the reverse

> of this is true in relation to the judgment of any Court acting beyond the pale of its authority . . . 'But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.' "

Petitioner cites several cases on pages 36 and 37 of its brief regarding the conclusive effect of a land department decision. We suggest those cases, and the quotations from them, must be read in context. For the cases also express exceptions to the rule quoted. For example, ***Johnson v. Drew*** (1898) 171 U.S. 93 also says at page 100:

> "In other words, the action of the land department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

The authority of the commissioners under the Act of 1851 was to separate the land already privately owned from that available for sale or donation to the new settlers by determining the boundaries of the privately owned land. There was no jurisdiction to determine whether easements or encumbrances existed - whether private or public - within the privately owned lands. To the extent the commissioner intended to make such a decision when he described the geography of the "inner bay" (and we do not think he had such intent) he was acting beyond his jurisdiction, and his decision in this respect was void.

CONCLUSION

This case involves a claim of a tideland easement by the State of California and the City of Los Angeles. The State and the City are not making a claim to title. Though a "broad" easement, it does not allow the State or City to make the numerous profitable uses they may make of tidelands to which they hold title. This court has recognized that the existence of an easement of navigation, fishing and commerce (the "public trust" easement) does not take all valuable rights in a property, and may exist even though title is in a private person. This court has recognized, by denial of petition for writ of certiori in ***Lyon v. California*** 454 U.S. 865, that the preservation of property for public trust purposes and under the claim of a public trust easement is not a taking of the property.

It has also been established that Congress, when it adopted the Act of 1851, did not intend to confer any special or exalted status on land patented under the act. Such land, and the owners thereof, are to be treated the same as other land and other owners.

Generally, the property rights, duties, and disabilities of owners of land patented by the United States is determined by state law. Only the fact of the transfer from the United States and the boundaries of such land are determined under federal law.

Petitioner essentially argues that two classes of land exist in California, one subject to California law and one, derived from Mexican grants, which has greater rights and lesser disabilities. We do not think this is true. If lagoons

and estuaries subject to the tides are generally subject to the public trust easements when privately owned, so should lands such as the Ballona Lagoon. This is the general rule applicable to federally patented lands; it should be applicable here.

Respectfully submitted,

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No. 82-708

IN THE

Supreme Court of the United States

October Term, 1983

SUMMA CORPORATION,

Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the Supreme Court of California

REPLY BRIEF OF PETITIONER

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No. 82-708

IN THE

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SUMMA CORPORATION,

Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the Supreme Court of California

REPLY BRIEF OF PETITIONER

This case concerns California's claim under the Equal Footing Doctrine to a tidelands "public trust" property interest in Mexican grant lands.[1] The rancho grant involved was confirmed by the United States and an unqualified federal patent was issued pursuant to the Treaty of Guadalupe Hidalgo (9 Stat. 922 [1848]) and the Act of March 3, 1851. (9 Stat. 631 [1851].) The questions presented are:

1. May the State now assert a "public trust" property interest in the confirmed Mexican rancho grant, even though the federal patent was issued without qualification or reservation?

[1] The present owner of the land, petitioner Summa Corporation, is part of a privately held interconnected network of corporations. (*See* Pet. Br. iii.n.1.)

2. May the State collaterally attack the General Land Office's 1873 factual determination that the rancho land involved was not tidelands?

Viewed in the perspective of these questions, the welter of arguments advanced by respondents is wide of the mark and unconvincing.[2]

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[2] As a threshold matter, respondents ask the Court to reconsider its grant of certiorari, claiming that this Court lacks jurisdiction because the case involves only the "incidents" of title which, respondents say, is a traditional state law question. (Cal. Br. 1, 23-28; L.A. Br. 22-27.) The court below never characterized the case as involving the "incidents" of title, but instead recognized that the case turns on whether California received any interest in Mexican grant lands upon its admission to the Union. This is a classic federal question, as this Court recently emphasized: "Federal law governs the scope of title initially vested by the equal-footing doctrine. . . ." *California, ex rel. State Lands Commission v. United States*, 457 U.S. 273, 286n.14 (1982). *See also State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-371, 375, 376-377 (1977).

I. THE 1851 ACT PATENT IS CONTROLLING AND PRECLUDES THE SILENT RESERVATION OF A "PUBLIC TRUST" PROPERTY INTEREST FOR CALIFORNIA.

A. The Patent Issued To Petitioner's Predecessors Does Not Reserve A "Public Trust" Interest.

The State places primary emphasis on the claim that petitioner's title is subject to an "express reservation" which assertedly includes the State's "public trust" property interest.[3] (Cal. Br. 8-15.) This argument is based upon the provision in the 1839 Mexican grant to the effect that the rancho may be enclosed "without prejudice to the traversing roads and servitudes (servidumbres)." The argument is flawed in two respects.

First, the "traversing roads and servitudes" provision has never been held to preserve so extensive and permanent a property interest as the State's asserted tidelands "public trust."[4] *United States v. Coronado Beach Co.*, 255

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[3] Regardless of the outcome of the "public trust" issue in this case, the environmental and ecological concerns of the State are protected by the regulatory framework of the California Coastal Act. Cal. Pub. Res. Code §§ 30000-30900. Pursuant to that Act, the California Coastal Commission must approve any proposed land use plan within the coastal zone and measure it against the environmental and other policies of the Act. *Id.*, §§ 30200-30264. On January 12, 1984, the Coastal Commission, acting on the advice of the California Department of Fish & Game, approved a land use plan for the Marina del Rey/Ballona area. Los Angeles Times, January 13, 1984, Part II, p.1. The land use plan includes a commitment by petitioner to set aside 209 acres of its land, all within the former "inner bay," as a wetlands nature preserve and wildlife habitat management area and to spend approximately $10,000,000 to restore and maintain this area for a period of 50 years.

[4] In a brief filed in 1982 in the case of *Amigos de Bolsa Chica v. Signal Properties*, 190 Cal. Rptr. 790 (App. 1983) (discussed *infra* at pp. 11-13), the State asserted that the Mexican grant for Rancho La Bolsa Chica was not subject to the "public trust" interest despite the presence of the boilerplate provision concerning traversing roads and servitudes. The precise language in the Bolsa Chica grant is as follows: "He may enclose it without prejudice to the crossroads and servitudes. . . ." *Transcript of the Proceedings in Case No. 405, Joaquin Ruiz, Claimant, vs. The United States, Defendant, for the place Named La Bolsa Chica.* 205 SD, page 14.

U.S. 472, 485-486 (1921), held that the provision did not diminish a grant of tidelands.[5] In *Barker v. Harvey*, 181 U.S. 481 (1901), the same language was held not to preserve the Indians' right of occupancy when they failed to present their claim in the 1851 Act proceedings. The Court said:

> "It [the provision] does not mean that the general occupation and control of the property is limited by any so-called servidumbres, but only that such full control shall not be taken as allowing any interference with established roads or cross roads, or other things of like nature." 181 U.S. at 499.

Measured by the *Barker* Court's interpretation, the language of the Mexican grant for Rancho La Ballona could not preserve a "public trust" property interest, because such an interest would clearly limit the "general occupation and control" of the property. Indeed, as pointed out in petitioner's opening brief, the "public trust" interest is an expansive and permanent property interest which extinguishes fundamental aspects of private ownership. What the "public trust" interest would permit the State to do — "to enter upon and possess" petitioner's land, to construct improvements on it, to afford public access and even to "preserve" the land in its natural state as open space without payment of compensation — clearly contravenes *Barker* by limiting petitioner's occupation and control of the land. (*See* Pet. Br. 10-12.)

The State, however, now seeks to downplay the "public trust" property interest, saying that it is "not true that Summa can do nothing with its property." (Cal. Br. 5.)

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[5] In attempting to discount *Coronado*, the State points to an argument made by the United States in that case. (Cal. Br. 10n.12.) What the State neglects to mention is that the Court declined to adopt the United States' argument that the compensation owed for its condemnation of Coronado Island should be reduced on the theory that, even if privately owned, the tidelands were burdened with a "public trust" easement. (Brief of the United States, *The United States of America v. Coronado Beach Co.*, No. 524, October Term 1920, pp. 46-54.) Instead, this Court held that the 1851 Act patent gave unqualified title to the tidelands. 255 U.S. at 487-488.

The State asserts that petitioner "has the right to make any use of the land it sees fit in the absence of the State's exercise of the retained public trust easement." (Cal. Br. 4.) This "right" is illusory. First, the State has already purported to exercise its "public trust" interest in petitioner's land.[6] Second, even if the State had not, the permissible private uses of property subject to the State's "public trust" interest are drastically restricted. A knowledgeable California state legal official has written:

> ". . . [T]he governmental trustee, not the private party, is vested with the trust use which is superior to the fee title. . . .
>
> ". . . [N]o private use of undeveloped tidelands can be made by the private patentee of such lands with any assurance that it will not be inconsistent with the remaining public trust easement." Taylor, *Patented Tidelands: A Naked Fee?* 47 CAL. ST. B.J. 420, 486 (1972) (footnotes omitted).[7]

A property interest as permanent and pervasive as that carved out by the California Supreme Court was clearly never intended to be reserved by the provision that the rancho grant could be enclosed "without prejudice to the traversing roads and servitudes." Rather, the provision was intended only to preserve a right of passage over "established roads or cross roads, or other things of like nature." *Barker v. Harvey*, 181 U.S. 481, 499 (1901).

Second, though glossed over in the State's brief, it is highly significant that the "traversing roads and servi-

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[6] "[T]he [California] Coastal Act [Cal. Pub. Res. Code §§ 30000-30900], insofar as it affects public trust lands, is an act exercising the public trust existing over such lands, as well as a regulatory act according to the policies in Chapter 3 of the Act." Staff of the California Coastal Commission, *Report re County of Los Angeles Local Coastal Program, Marina del Rey/Ballona Land Use Plan (LUP)*, October 7, 1983, p. xiv.

[7] The author of this article, which is cited by the State (Cal. Br. 4), is the same N. Gregory Taylor, Esq., Assistant Attorney General, who appears on the State's brief here. The article contains the standard disclaimer that "[t]he views expressed . . . are those of the writer and do not necessarily reflect the views or policies of the Department." 47 CAL. ST. B.J. at 421.

tudes" provision was not included in the controlling patent issued to petitioner's predecessors in 1873 as a result of the 1851 Act proceedings. The federal patent is unqualified and without reservation. (J.A. 101-109.)

Nevertheless, the State implies that the "express reservation" of the "traversing roads and servitudes" provision was carried forward in the 1854 decree of confirmation of the Board of Land Commissioners (Cal. Br. 9n.10), but that suggestion does not withstand scrutiny. The decree does not incorporate the so-called "express reservation" or any language to that effect. (J.A. 21.) The decree's only reference to the original Mexican grant is to provide "further description" of the physical boundaries. (*Id.*) The 1855 confirmatory order of the United States District Court also refers to the original grant only for "a more particular description" of the physical boundaries, and again there is no reference to the so-called "express reservation." (J.A. 22-23.)

Under the 1851 Act, the Board of Land Commissioners was required to decide all issues concerning the validity and legal operation of the grant under Mexican law. (§§ 8, 11; P.A. A109-A110, A111.) *See also United States v. Fossatt*, 62 U.S. (21 How.) 445, 448-449 (1859). The Board's nonincorporation of the "traversing roads and servitudes" language represents a decision well within its competence and authority, and is not subject to reconsideration now. *More v. Steinbach*, 127 U.S. 70, 84 (1888). Since there was full compliance with the statutory scheme, and since jurisdiction under the Act of 1851 was to decide all questions and conflicting claims "rightly or wrongly," *Thompson v. Los Angeles Farming Co.*, 180 U.S. 72, 77 (1901), the absence of the so-called "express reservation" from the decree and patent is conclusive.[8] *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491-492 (1865).

[8] *New Orleans v. United States*, 35 U.S. (10 Pet.) 622 (1836), is not analogous to the present case. In *New Orleans*, the federal government's attempt to exercise "local sovereignty" over municipal land in New Orleans was rejected, not because a "public trust" title interest in the land survived the Louisiana land confirmation process, but because the federal government is constitutionally precluded from exercising local governmental power. 35 U.S. (10 Pet.) at 735-736. *See also Van*

B. California's Belated Assertion Of A "Public Trust" Interest Is Barred.

Petitioner's opening brief demonstrated that the State's failure to present its claimed "public trust" property interest in the 1851 Act proceedings prevents its belated assertion now (Pet. Br. 24-27) and that, when it issued an unqualified patent, the United States did not secretly reserve any rights in petitioner's land. (Pet. Br. 27-31.) The State's response is to reject the applicability of the Act of 1851 and such cases as *Barker v. Harvey*, 181 U.S. 481 (1901), *United States v. Title Insurance Co.*, 265 U.S. 472 (1924), *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), and *United States v. Rindge*, 208 F. 611 (S.D. Cal. 1913), on the ground that they dealt only with property rights. (Cal. Br. 10n.12, 18n.18, 21n.20.) The suggestion seems to be that the tidelands "public trust" is not a property interest, but a "sovereign right" which the Equal Footing Doctrine passed to the State unaffected by the 1851 Act proceedings.

In so arguing, the State confuses the reason it claims to have obtained a "public trust" property interest with the nature of what it assertedly obtained. While the Equal Footing Doctrine is rooted in sovereignty and the

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Brocklin v. Tennessee, 117 U.S. 151, 167-168 (1886); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845) ("the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted"). There is nothing in *New Orleans* to suggest that if the land involved had been confirmed and patented to a private party without reservation, as Rancho La Ballona was, the City would have been held to have any interest in it.

Nor is *Eldridge v. Trezevant*, 160 U.S. 452 (1896), in point. *Eldridge* dealt with Louisiana's limited servitude for the construction of levees over lands on the shores of rivers subject to overflow; it did not involve a permanent property interest, like California's "public trust," which is held to exist regardless of the land's present condition. The levee servitude was upheld, not because of its French and Spanish precursors, but because it was expressly created by the Louisiana Civil Code in a valid exercise of state police power. 160 U.S. at 462-464, 468-469.

state prerogatives it confers are held "in trust" for the public, *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 453 (1892), it has long been recognized that the Equal Footing Doctrine has "a direct effect on certain property rights," namely "ownership" of tidelands. *United States v. Texas*, 339 U.S. 707, 716-717 (1950). By virtue of its sovereignty, California received "absolute property" in tidelands, but only those which had not been the subject of prior grants by Mexico. *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65-66 (1873); *Knight v. United States Land Association*, 142 U.S. 161 (1891); *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977). The fact that the State is now claiming an interest less than the full fee does not make it any less a property interest. Indeed, in the end even the State admits that "the [asserted] public trust easement over tide and submerged lands is a reserved public title interest." (Cal. Br. 39.)

The State's attempt to distinguish the cases cited by petitioner because they involve property rights collapses when it is remembered that the "public trust," as enunciated and enlarged by the California Supreme Court, is a broad property interest which leaves the private owner with only "naked title to the soil." *See People v. California Fish Co.*, 166 Cal. 576, 589-599, 138 P. 79, 84-88 (1913). Under California law, this "public trust" interest exists independent of the police power and does not depend upon the present condition of the land, but upon its historical character as tidelands when California was admitted to the Union.[9] *Newcomb v. City of Newport Beach*, 7 Cal. 2d 393, 399, 60 P.2d 825, 829 (1936). The "public trust" may be asserted by any interested citizen

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[9] By emphasizing the current condition of the property (Cal Br. 1-3; L.A. Br. 1-3), respondents may be seeking to create the impression that the decision below is an application of the State's navigational power rather than a holding that the State owns a permanent property interest in petitioner's land. However, the Court below chose to uphold the State's claim to petitioner's property on the basis of a "public trust" interest, and it is on that basis that it must be judged. *See Michigan v. Long*, 103 S.Ct. 3469, 3476 (1983); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950).

— even against an attempt by the State to relinquish it. *Marks v. Whitney*, 6 Cal. 3d 251, 261-262, 98 Cal. Rptr. 790, 797-798, 491 P.2d 374, 381-382 (1971).

The nature and magnitude of the asserted "public trust" interest brought it squarely within the ambit of the 1851 Act. The Act, in order to achieve its purpose of giving security of land titles, required all persons "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present their claims to the Board of Land Commissioners within two years. (§§ 8, 13; P.A. A109-A110, A111-A112; Pet. Br. 18-24.) Because the "public trust" interest is a pervasive and perpetual easement which virtually destroys the value of the private property, a statute with the avowed purpose of stabilizing property rights could not fail to embrace so extensive a property interest.

That property interest, if it ever existed, derived from the United States under the Equal Footing Doctrine. The 1851 Act patent to petitioner's predecessors is conclusive upon those — like California — who claim property rights from the United States in conflict with a confirmed Mexican grant.[10] *United States v. O'Donnell*, 303 U.S. 501, 512-513 (1938).

The State also asserts that it should not be barred from making its belated claim of a "public trust" interest on the additional ground that the State could not — or

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[10] *Townsend v. Greeley*, 72 U.S. (5 Wall.) 325, 337 (1866), is not authority that the 1851 Act proceedings lack conclusive effect simply because the State claims to be acting as "trustee" of the public in asserting rights in former Mexican grant lands. In *Townsend* the Court said that the confirmation of a pueblo grant need not expressly recite the beneficial interest of the inhabitants of the city. This ruling reflects the statutory provision that the confirmation proceeding shall not affect the rights of third parties. (§ 15; P.A. A113.) *See also More v. Steinbach*, 127 U.S. 70, 83 (1888). Unlike *Townsend*, there is no issue here as to the capacity — trustee or beneficial owner — in which petitioner's predecessors held their title, and the State, as successor to the United States, is not a third party to the confirmation proceeding. *United States v. O'Donnell*, 303 U.S. 501, 512-513 (1938). The issue here is whether the State — in any capacity — owns an interest in petitioner's land.

"in practice" did not — participate in 1851 Act proceedings. (Cal. Br. 16n.17.) The argument proves too much. If correct, California would be equally free to claim fee title, instead of a "public trust" interest, to any tidelands within a Mexican grant on the ground that the State's right to such "sovereign" lands was not precluded by the 1851 Act proceedings. The claim to fee title is clearly foreclosed, *e.g.*, *San Francisco v. LeRoy*, 138 U.S. 656, 671 (1891), and the claim to a "public trust" interest is indistinguishable in this respect.

Moreover, the State's contention of non-participation in 1851 Act proceedings is wrong both legally and factually. As early as 1864, nine years before the patent for Rancho La Ballona was issued, California had the express statutory right, when "claiming to have an interest in the tract embraced by [a] survey, or in any part thereof," to file with the Surveyor General for California objections to the published survey of any rancho.[11] 13 Stat. 332 (1864).

Indeed, the State at least occasionally availed itself of this statutory right. It participated in the 1851 Act proceedings with respect to Rancho Sausal Redondo, the rancho immediately south of La Ballona in the Los Angeles basin. (The National Archives, RG 49, California Private Land Claims, Docket 414.) Following the confirmation of the grant for Rancho Sausal Redondo, a controversy arose as to the survey of the grant. The State of California appeared in the 1851 Act proceedings to claim that certain land included in the final survey belonged to the State by virtue of a grant of public lands by Congress. 5 Stat. 453, 455 (1841). In this connection, the State in 1871 filed a printed brief entitled "Appeal from the Commissioner of General Land Office in Sausal Redondo and

[11] From 1860 to 1864, the State, when claiming a "right or title derived from the United States," had the right through its own counsel to "aid" the United States District Attorney in representing its interest, although the State could not intervene directly. 12 Stat. 33, 34 (1860). Prior to 1860, rights of the State derived from the United States were protected in 1851 Act proceedings by a law agent, appointed by the President, "whose special duty it shall be to superintend the interests of the United States." (§ 4; P.A. A108.)

Other Cases Involving the Surveys of the Rancho Tajauta; Aguage del Centinela; Cienega O'Paso de la Tijera, and Sausal Redondo; All in Los Angeles County, California."

This example demonstrates that the State could — and did, when it thought its interests threatened — participate in Mexican grant confirmation proceedings. That it did not do so in the [redacted] of Rancho La Ballona is a reflection, not of the State's inability to protect itself, but of the contemporary view that the State had no property interest in Mexican rancho lands.

C. The State's Attempt To Impose A Tidelands "Public Trust" On Mexican Rancho Lands Is A Recent Invention.

The State's brief attempts to create the impression that it has long been recognized that the State holds a "public trust" interest in Mexican rancho lands. For example, the State argues that the "state high court did not impress an interest on lands that previously had not been so encumbered; rather, it merely recognized what had always been the case...." (Cal. Br. 4.) Again, the State says that the "public trust has always existed over Ballona Lagoon." (Cal. Br. 5.)

On the contrary, the decision below unsettles titles to Mexican rancho lands thought to have been decided more than a century ago. Prior to the present case, the California courts had never suggested that the State owned any interest in tidelands or wetlands which were patented to private Mexican grantees and had never been owned by the State in fee. The court below explicitly recognized that fact. (P.A. A10.) As recently as two years ago, so did the State.

In a brief filed in January 1982 in the case of *Amigos de Bolsa Chica v. Signal Properties,* 190 Cal. Rptr. 790 (App. 1983), the State expounded the common understanding that no "public trust" interest existed in con-

firmed Mexican rancho lands. Respondents' Brief, *Amigos de Bolsa Chica, Inc. v. Signal Properties, Inc.*, California Court of Appeal, 4 Civ. Nos. 23146 and 23778.[12]

The *Bolsa Chica* case involved a 1973 boundary and land exchange agreement made pursuant to a state law (Cal. Pub. Res. Code § 6307) providing for the settlement of title and "public trust" claims between the State and private owners. 190 Cal. Rptr. at 802. While the Bolsa Chica property is largely separated from the ocean by Pacific Coast Highway and most of it is cut off from tidal action by a dam built in 1899, historically it was subject to the ebb and flow of the tides and some of the area may have been submerged lands. *Id.* Title to most of the land was derived from the Mexican grant of Rancho La Bolsa Chica confirmed and patented under the Act of 1851; the balance came from state tidelands patents.

The State, seeking to uphold the settlement, described the origins of land titles in California and the special status of Mexican grant lands. (Pp. 3a-7a, *infra*.) The brief emphasized that under the Equal Footing Doctrine, California received sovereign ownership only of "ungranted" tidelands, i.e., those not previously granted by Mexico. (P. 7a, *infra*.) The State pointed out that Mexican rancho lands are not subject to the "public trust"

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[12] The relevant pages of this State brief are reproduced as an appendix. *Infra*, pp. 1a-14a. The California Supreme Court granted hearing in the *Bolsa Chica* case on August 18, 1983, but has not yet rendered its decision. The opinion of the Court of Appeal cited above was superceded by the grant of hearing and not published in the official reports. *See* Cal. Rules of Court, Rule 976(d) (1972).

The State's brief in the *Bolsa Chica* case was filed while the present case was under submission in the state supreme court. In a letter subsequently submitted to the Court of Appeal in the *Bolsa Chica* case, the State claimed that page 28 of its original brief (pp. 10a-11a, *infra*) "erroneously states that the Rancho lands were not subject to the public trust," and that "this statement in the brief was made in error." Letter to the Court, *Amigos de Bolsa Chica, Inc. v. Signal Properties, Inc.*, California Court of Appeal, 4 Civ. Nos. 23146 and 23778, October 20, 1982, p. 3n.2. (This letter is reproduced in the Appendix. *Infra*, pp. 15a-23a.) No explanation was offered as to how the "error" occurred. Nor did the State disavow the statements on other pages of the original brief to the same effect.

and thus were not freed from the "public trust" by the Bolsa Chica agreement:

> "... [T]he State did not terminate the public trust within all 1,700 acres, as claimed. The State first determined in the Agreement that 1,444.52 acres of the Bolsa Chica area were rancho lands *not* subject to the State's tide and submerged land claims....
>
> "Within the area declared free of the public trust were 1,251.95 acres of rancho lands as to which such a declaration was only confirmatory, as no public trust existed over rancho lands." (P. 10a, *infra;* emphasis in original.)

The brief contains further statements to the same effect: "the 1,251.95 acres of rancho lands ... were already independent of the public trust" (p. 12a, *infra*); "rancho lands ... were not subject to the trust." (P. 12a note 39, *infra.*)

The State's unequivocal assertion in its own appellate court just two years ago that "no public trust existed over rancho lands" reflects the understanding prevailing for more than a century prior to the California Supreme Court decision. That understanding should not be changed now to allow imposition of a far-reaching "public trust" property interest on land unqualifiedly patented by the federal government under the Act of 1851.[13]

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[13] Illustrating the potential reach of the decision below in this area is a contemporary map of the Ballona Lagoon area on which the State Lands Commission's line designating "where the public trust may exist" is superimposed. (Pet. Br. App.) The State protests that the map is not a State Lands Commission map, though it acknowledges that such maps are used by the California Coastal Commission. (Cal. Br. 3n.5.) It is not clear why the State seeks to shift responsibility for the preparation of this "public trust" line to the Coastal Commission, a companion State agency, but the effort is unconvincing. An April 14, 1983 letter written by the Executive Director of the State Lands Commission admits that "Staff of the State Lands Commission has supplied to the Coastal Commission maps showing the approximate extent of potential public trust lands." Staff of the California Coastal Commission, *Report re County of Los Angeles Local Coastal Program, Marina del Rey/ Ballona Land Use Plan (LUP)*, October 7, 1983, Exhibit F-16.

II. THE LAND OFFICE'S DETERMINATION THAT THE LAND WAS NOT TIDELANDS IS CONCLUSIVE.

In its opening brief, petitioner demonstrated that the General Land Office had made a determination in the 1851 Act proceeding that the property in question was not an arm of the sea and thus not tidelands, and that this finding is conclusive. (Pet. Br. 31-37.) Respondents' principal response is to cite historical evidence challenging the factual basis for the finding.[14] This is an impermissible collateral attack. *Gardner v. Bonestell*, 180 U.S. 362, 369-370 (1901). Indeed, the basic purpose for the rule of conclusiveness is to insure that "such questions cannot thereafter be relitigated in the courts," as respondents are attempting to do. *Johnson v. Drew*, 171 U.S. 93, 99 (1898).

In seeking to adduce evidence contrary to the Land Office's finding, respondents place great emphasis on the "inlet" designated on the initial Hancock survey. (Cal. Br. 2n.2, 29, 31, 35, 36; L.A. Br. 2, 34.) Despite the State's insistence that the Hancock map was never "amended" or "changed" (Cal. Br. 32, 34, 35), the map was in fact amended to delete the reference to the "inlet."

[14] It was admitted at trial that the waters of Ballona Lagoon are not navigable under any federal test. (C.T. 986.) While the trial court found that at high tide the lagoon is navigable by "rowboats, canoes, surfboards and other shallow-draft craft" (P.A. A52), this limited navigability may be the result of dredging. For example, the text accompanying the 1908 photograph appended to the State's brief (App. 3) describes some of the dredging that had taken place in the nineteenth century in an effort to create a "Port Ballona":

> "In the spring of 1886 the Ballona Harbor & Improvement Company was organized. . . . It was proposed to excavate a channel 200 feet long by 300 feet wide which would let the tide into the lagoon where Ballona Creek entered the sea. This would create an inner harbor two miles long and from 300 feet to 600 feet wide with depth varying from six to twenty feet. It was declared that this harbor would float the fleets of the world. . . .
>
> "A large amount of dredging was done and a great deal of money — nearly $300,000 — was spent during the three years in which work was carried on (more or less spasmodically) upon the proposed harbor." W. MYERS & I. SWETT, TROLLEYS TO THE SURF 49 (1976).

This emendation can be seen by comparing the 1858 plat (J.A. 26) with the plat finally approved by Willis Drummond, Commissioner of the General Land Office, on December 8, 1873, which was introduced into evidence at the trial below (D. Ex. B; R.T. 292, 997) and is appended to the State's brief. (Cal. Br. App. 1.) Conspicuously absent from this final plat is the designation "inlet" which appeared on the initial Hancock survey. The deletion of the word "inlet" makes the final plat completely consistent with the December 18, 1872 report of Surveyor General Hardenbergh,[15] which referred to this area as the "outlet" of Ballona Creek to the ocean (J.A. 111), and with Commissioner Drummond's determination that it is the place "where it empties into the ocean." (J.A. 93.)

Having been deleted from the final plat, the earlier designation "inlet" could hardly create an ambiguity justifying a collateral attack on the express determination that the "inner bay" was not an arm of the sea and thus not tidelands. The California Supreme Court's reexamination of the 1850 character of the land to retroactively award the State a major property interest violates the fundamental principle of conclusiveness of patent determinations. *Gardner v. Bonestell*, 180 U.S. 362, 369-370 (1901); *Johnson v. Drew*, 171 U.S. 93, 99 (1898).

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[15] The State accuses both petitioner and the Solicitor General of "desperate advocacy" for pointing out (Pet. Br. 33n.37; U.S. Br. 21n.22) that the year of this letter should be 1872 instead of 1873, asserting "[t]here is nothing to suggest that the letter's date is anything other than that appearing on the face of the letter." (Cal. Br. 33n.30.) On the contrary, there is an abundance of evidence to show that the letter's true date is December 18, 1872. Hardenbergh personally certified the patent for Rancho La Ballona on November 23, 1873, and the patent was issued by President Grant on December 8, 1873. (J.A. 108-109.) There would have been no reason for Hardenbergh to write the report on December 18, 1873, after the final decision of the General Land Office and after the patent was issued. Moreover, in the original archives the handwritten notation "(2)?" appears above the "3" in the year, and the translation of the Mexican record which the report transmitted (J.A. 110) was certified by Hardenbergh on December 17, 1872. (D. Ex. A.)

CONCLUSION

For all of the foregoing reasons, as well as those set forth in petitioner's opening brief, the judgment of the Supreme Court of California should be reversed and the case remanded for further proceedings consistent with the decision of this Court.

Respectfully submitted,

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February, 1984

APPENDIX

4 Civil Nos. 23146 and 23778

IN THE

Court of Appeal of the State of California

FOURTH APPELLATE DISTRICT

Division Two

AMIGOS DE BOLSA CHICA, INC., et al.,
Plaintiffs and Appellants,

vs.

SIGNAL PROPERTIES, INC., et al.,
Defendants and Respondents.

RESPONDENTS' BRIEF

Appeal from the Judgment of the Superior Court of the State of California, in the County of Orange Honorable Oretta F. Sears, Judge

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INTRODUCTION

In 1973 the State and Signal entered into an agreement settling public trust rights in Bolsa Chica. Six years later, the Amigos de Bolsa Chica, Inc. ("ABC") filed this lawsuit. The trial court ruled that ABC had waited too long and that the action was barred by Public Resources Code section 6341.

The State submits that the statute of limitations is dispositive of this action. However, due to the unique quality of public trust lands and the allegations of appellants, it is necessary to examine the factual background and applicable case law. For this reason, the brief will begin with a discussion of the nature of the public trust.

[*2] ***STATEMENT OF FACTS**

A. History of Bolsa Chica Leading to Dispute Between Signal and the State.

By this action, commenced in 1979, Amigos de Bolsa Chica, Inc. and the individual plaintiffs (hereinafter referred to collectively as "ABC"), seek to invalidate a compromise agreement settling disputed claims between the State of California[1] and the private defendants (hereinafter referred to collectively as "Signal" or the "Signal Companies"). The agreement is entitled "Boundary Settlement and Exchange Agreement Regarding Lands in the Bolsa Chica Area, Orange County, California," and was executed in March 1973 (hereinafter "Agreement" or "1973 Agreement") following more than two years of study, evaluation, and appraisal, including extensive public discussion and participation. This statement of facts will set forth the history and terms of the Agreement in order to make it clear that ABC's six year delay in commencing this suit renders it untimely, and that, in any event, the Agreement is valid.

The Bolsa Chica property[2] is located in Orange County, and is separated from the ocean by Pacific Coast Highway Route 1. (Exh. 11, p. 2.)[3] "Bolsa Chica," which means the "little purse" (little bay), is now a misnomer; no separate bay entrance presently exists. Tidal action occurs only through a highway culvert and affects a small portion northerly of a dam cutting off the majority of the area from such action. (Exh. 1, p. 258.)

Prior to the 1973 Agreement, Signal claimed fee title to the entire parcel comprised of over 1,970 acres. The

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[1] ABC's complaint named the State of California, the State Lands Commission, the Attorney General, and the Department of Fish and Game. These entities will be referred to hereinafter as the "State."

[2] The Bolsa Chica property involved in this suit is a 1,970 acre fraction of the original 8,000 + acres covered by the Rancho La Bolsa Chica and associated tideland patents.

[3] The trial court took judicial notice of the State's exhibits 1-49 and the Petition for Writ of Mandate, certain pleadings and exhibits in *City of Long Beach v. Mansell*, California Supreme Court, L.A. No. 29700 [3 Cal. 3d 462 (1970)]. This court is asked to do likewise. (Evid. Code § 459(a).) Appendix "A" hereto is a color reproduction of the Exhibit 12 map.

State, on the other hand, asserted fee title to a portion of the property, i.e. the historic submerged lands, and further asserted a public trust easement for commerce, navigation and fisheries over an area of patented tidelands. After extensive study, the State concluded that its submerged lands claims totaled 63 acres of fee title and its tideland easement claims affected 463.4 acres for a total of 526.4 acres. (Exh. 1, p. 023.) The boundaries of the area affected by the State claims were uncertain. Thus, property rights in the area were in dispute, and title was clouded. It was this dispute that was resolved by the 1973 Agreement. (Exh. 1, pp. 019-020.)

1. Origins of Land Title in California.

In order to set this case in proper context, it is necessary to set out not only its factual background but also an abbreviated history of land titles in California.

[*3] *Land in California derives from three basic sources:

(1) Mexican grants, mostly ranchos and pueblo lands, titles to which were derived from Spain and Mexico prior to California's becoming a state, and later confirmed by the United States.

(2) United States public domain lands, embracing all lands passed to the United States on Mexico's cession of California, excluding state lands and Mexican grants.

(3) State lands, embracing lands granted by Congress to California out of the public domain, and tide and submerged lands which the State received by virtue of its sovereignty upon admission to the Union.[4]

This case involves land encompassing categories (1) and (3) above: Mexican grant lands (ranchos), and state tide and submerged lands. Despite ABC's allegations that the 1973 Agreement purported to convey to Signal 1,700 acres of tidelands (I CT 82, 88, 89, 99; II CT 1C, 1F, 1O, 1R, 1S, and 1T), official documents duly noticed by the trial court show that of the 1,970.02 acres of the Bolsa

[4] II Ogden's Revised California Real Property Law (1st ed. 1975) p. 1237.

Chica area here considered, 1,444.52 acres were rancho lands. (Exh. 14, p. 16.) We will first examine how the rancho lands have been treated.

a. *Federal Confirmation of the Rancho La Bolsa Chica.*

There are two rancho grants involved in this case. One is the grant of the La Bolsa Chica Rancho. The other is the Las Bolsas Rancho grant.[5] The Rancho La Bolsa Chica was conveyed by grant of Mexico to Joaquin Ruiz on July 31, 1841.

The Treaty of Guadalupe Hidalgo was signed in 1848 (9 Stat. 922), following the war with Mexico. Article 8 of the Treaty provided:

> "In the said territory, property of every kind, now belonging to Mexicans now established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."

Following the acquisition of lands from Mexico, Congress created a procedure for establishing title to those lands in private parties, towns, etc., by enacting the Act of March 3, 1851 (9 Stat. 631). This Act authorized the President of the United States to establish a Board of Land Commissioners with judicial powers. The Board was to review all claims arising under the treaty, consider
[*4] evidence presented both *on behalf of the claimant and the United States, decide the validity of the claim and certify its decision to the United States District Attorney. (*Id.*, at section 11.)

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[5] The Las Bolsas Rancho grant concerns only a minor area along the southeasterly boundary of the Bolsa Chica area. These coastal sand hills and minor blufftop areas, i.e., high ground, are not amenable to ABC's arguments. [See p. 284 of Exh. 1 (Exh. 2 of Resources Agency Conceptual Plan) and Exhs. 4 and 7.] In any event, the confirmation procedures described for the Rancho La Bolsa Chica apply equally to Rancho Las Bolsas. (See Exh. 7, 8 and 9.)

In reviewing the validity of the claims, the Board was to:

> "... be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are equitable." (*Id.*, at section 13.)

Upon confirmation of a claim by the Board, a certificate of confirmation and a plat or survey of the lands, approved by the U.S. Surveyor General of California, was to be issued to the claimant, who would present them to the general land office and be issued a United States patent.

The Act of March 3, 1851 was subsequently amended by the Act of June 14, 1860 (12 Stat. 33). This amending act provided for publication of the U. S. Surveyor General's approval of a survey and plat, and authorized the district court in its discretion to reexamine a survey upon request of any interested party.

Upon reexamination, the court was entitled to consider new testimony and to "render judgment thereon." The court's judgment might annul or correct the location and survey, and might cause the U.S. Surveyor General to correct and return a new survey and location. A six month period was allowed for appeal of a district court decree. The final approved survey and location was then returned to the U. S. Surveyor General, who transmitted it to the General Land Office, which issued the patent.

A subsequent Act of July 1, 1864 (13 Stat. 332) repealed the Act of June 14, 1860, but allowed all proceedings commenced under the former Act to proceed to a complete determination and decree.

The procedures of the Act of March 3, 1851 were followed in the Ruiz application for confirmation of the Rancho La Bolsa Chica. (Exh. 3.) A survey of the confirmed claim was then undertaken and published. (Exh. 4.) Since the motivating factor underlying the

1973 Agreement was a disputed boundary, it is important to note that Ruiz excepted to the results of this survey. He argued that the ocean boundary of the federal patent should have been drawn along the ocean beach, across the mouth of the southeasterly inlet shown on exhibit 4.[6] However, the court overruled his exceptions and held for the boundary shown on exhibit 5 of the survey, excluding the inlet from the Rancho and thereby leaving it as sovereign lands. [*Joaquin Ruiz, Appellee* ads. *the United*
[*5] *States, Appellants* — No. 205 "Bolsa *Chica" (1857 and 1864) (summarized in Hoffman's Reports (1975) Appen. p. 56); see also exh. 3, pp. 1-2.] The confirmatory patent was issued by President Grant on May 7, 1874. (Exh. 3.)[7]

b. *State Patent of the Bolsa Chica Tidelands.*

As to ungranted tidelands and ungranted submerged lands beneath inland waters, it has long been established that the lands below the ordinary high tide line were reserved to the original states by virtue of their sovereignty at the conclusion of the War of Independence. (*Knight v. United Land Association, supra*, 142 U.S. 161, 183.) States subsequently joining the Union also obtained title to such lands on the basis of the "equal footing" doctrine. [*Pollard's Lessee v. Hagan* (1845) 44 U.S. (3 How.) 210 [11 L.Ed. 565]; II Shalowitz, Shore and Sea Boundaries (1964) p. 427.] Therefore, when California became a state, it assumed soverign ownership over all lands held in trust for it by the federal government, namely all ungranted tide and submerged lands. (*Knight, supra*, 142 U.S. 161, 186.)

Shortly after statehood, California enacted statutes permitting the sale of tidelands. (See statutes cited in *People v. California Fish Co.* (1913) 166 Cal. 576.)

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[6] Bolsa Bay was at one time a small inlet or estuary having its own entrance to the Pacific Ocean. (Exh. 1, p. 319.)

[7] Many cases have held that where the procedure of the Act of March 3, 1851, *supra*, has been followed and a patent issued, such a federal patent is conclusive on this question. (See, e.g. *Knight v. United Land Association* (1891) 142 U.S. 161, 184 [35 L.Ed. 974, 12 S.Ct. 258]; *Beard v. Federy* (1865) 70 U.S. (3 Wall.) 478, 491 [18 L.Ed. 88]; *U.S. v. Coronado Beach Company* (1921) 255 U.S. 472, 486-488 [65 L.Ed. 736, 41 S.Ct. 378].)

Pursuant to these statutes, Horace M. Dobbins applied for a tideland patent to the southeasterly "inlet" area excluded from the federal patent of Rancho La Bolsa Chica. In 1899, pursuant to Tide Land Location No. 195, the State issued a tideland patent to Dobbins respecting that southeast "inlet". (Exh. 9; and see exh. 1, p. 284.) The lands described in the patent were subsequently conveyed to the Bolsa Land Company, then owner of the surrounding Rancho La Bolsa Chica.[8] The tideland patent recited an acreage of 528.82 acres. (Exh. 9, p. 5.)[9] The tideland patent area included islands surrounded by tidal channels (143.42 acres) and submerged lands (63 acres). (Exh. 14, pp. 5-6.)[10]

2. Bolsa Chica Development.

Following the issuance of the state patent, the Bolsa Land Company began work to reclaim most of the area
[*6] from tidal flows. In 1899, the Company built a *dam to block all seawater and to retain fresh water flowing into the low-lying portions of the tidelands. (Exh. 1, p. 265; exh. 11, pp. 23-25.) Only a small lagoon was left open to seawater.

In *Bolsa Land Co.* v. *Burdick* (1907) 151 Cal. 254, 259 it was noted, "[d]irect communication with the ocean was thus cut off, the water became inland waters not subject to the tides, and were and are wholly enclosed by the lands claimed by plaintiffs under their patents and deeds." In addition the State Lands Commission (which had not been a party to the *Bolsa* case) noted in 1973

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[8] A second State tideland patent is peripherally involved by ABC's action. This is the patent issued to R. J. Northam in 1903 pursuant to Tide Land Location No. 221. (Exh. 10.) This patent area is now a major portion of the Huntington Harbour area of Huntington Beach, which area was the object of an earlier tideland settlement and exchange with the State pursuant to section 6307 of the Public Resources Code. As only the southerly tip of this tideland patent area is involved, it will not be further considered. The validity of the Huntington Harbour agreement, as well as many others, may be affected by this case.

[9] The acreage was later measured at 526.4 by the State's resurvey prepared for the Agreement. (Exh. 14, p. 6.)

[10] The patent was issued pursuant to Political Code section 3340 (1872). Neither the statute nor the patents suggested any intent to improve navigation. In fact, the patents were made for general and unspecified uses. (*People v. California Fish Co., supra*, 166 Cal. 576.)

that, "[t]he dam caused the [ocean] inlet mouth to close by silting." (Exh. 1, p. 320.) Since the inlet mouth had sanded shut, a drainage access ditch was dug to the northwesterly inlet, Anaheim Bay. (Exh. 11, p. 25.)

3. Reasons for Settling the Dispute by Agreement Rather than Litigation.

The dispute between the State and Signal arose because Signal, successor in interest to both the federal rancho and state tideland patents, planned extensive development of the area. Resolving the dispute was an extremely complex project, exacerbated by several factors.

Signal asserted that the rancho grant conveyed all right, title and interest to the entire Bolsa Chica area to private ownership. To the extent that any rights in tide and submerged lands remained, Signal claimed they were held by Signal free of the public trust for commerce, navigation and fisheries. The State contended that the federal La Bolsa Chica Rancho patent did not convey title to the "inlet" shown on the plat of the Rancho (Exh. 4). The State contended that the state tideland patent conveyed title to the tidelands but that they remained subject to a public trust easement for commerce, navigation and fisheries. Moreover, the State maintained that those lands within the state tideland patent which were submerged lands in 1899 were not conveyed by the tideland patent and remained in the State's fee ownership. (Exh. 1, pp. 19-20.)

The 1861 Hancock survey on which the rancho patent was based did not close properly. (Exh. 11, p. 39.) The survey markers and critical monuments had disappeared over the years. (Exh. 11, pp. 35, 40.) No precise relocation of the boundary had been made since the 1860's. (Exh. 1, p. 320.) In fact, no fixed-line boundary had ever been made. The Hancock survey line was intended to be an approximation of the intended boundary: the line of ordinary high tide. (Exh. 11, pp. 37-39.) This natural boundary subsequently fluctuated due to natural and man-made changes. (Exh. 11, p. 48-49.)

Similar problems existed with the boundary location of the state tideland patent. No contemporary map of the ordinary low tide line (the submerged land

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[*28] *McQuillan, Municipal Corporations (3d ed. 1968) § 48.17 at pages 119-120.) With respect to State lands, the Legislature has delegated the power to compromise or settle claims to the State Lands Commission; upon approval by the Governor, such agreements becoming binding on the State. (§ 6107.)

C. The State has Specific Authority to Extinguish the Public Trust Under Certain Circumstances.

ABC claims that the State did not effectively terminate the public trust in Bolsa Chica.

It must first be noted that the State did not terminate the public trust within all 1,700 acres, as claimed. The State first determined in the Agreement that 1,444.52 acres of the Bolsa Chica area were rancho lands *not* subject to the State's tide and submerged land claims. It then conducted a trade of certain of those lands so as to acquire clear fee title to a 300 acre parcel, plus 27.5 acres of Highway lands. The land outside of these areas, approximately 1,700 acres, was declared free of the public trust, including 230 acres on which the State was given a 14 year lease, to which it could acquire fee title upon construction of an ocean entrance.

Within the area declared free of the public trust were 1,251.95 acres of rancho lands as to which such a declaration was only confirmatory, as no public trust existed over rancho lands.

Within the area declared free of the trust also lay 412.56 acres of former tidelands and 17.93 acres of former submerged lands. As to the tide and submerged lands as well, ABC fails in its claim that the action of the State was ineffective to terminate the trust.

From *City of Long Beach* v. *Mansell, supra,* 3 Cal. 3d 462, 485, back to *Eldridge* v. *Cowell* (1854) 4 Cal. 80, 87, the right of the State to convey soverign tide and submerged lands free of the trust for commerce, navigation

and fisheries has been established. *Eldridge* v. *Cowell*, *supra*, was a case involving the sale of water lots in San Francisco. It stated that:

> "The right of the State to do this has been established by repeated decisions. She holds the complete sovereignty over her navigable bays and rivers, and although her ownership is, by the law of nations, and the common and civil law, attributed to her for the purpose of preserving the public easement, or right of navigation, there is nothing to prevent the exercise of her power in certain cases to destroy the easement, in order to subserve the general good, which, when done, subjects the land to private proprietorship." (*Id.* at 87.)

* * *

[*30] *may find and determine that such lands are no longer useful for trust purposes and free them from the trust. When tidelands have been so freed from the trust — and if they are not subject to the constitutional prohibition forbidding alienation — they may be irrevocably conveyed into absolute private ownership."

Likewise, in *County of Orange* v. *Heim*, *supra*, 30 Cal. App. 3d 694, 722-723, a case reviewing another boundary settlement and exchange agreement entered into by the State Lands Commission (the "SLC"), the court inquired into whether or not the action of the SLC in freeing certain tidelands from the public trust and conveying them away would substantially impair "the public interest in the lands and waters remaining," or impair the "power of succeeding legislatures to protect, improve and develop the public interest in commerce, navigation and fisheries." The court held that the exchange proposed was:

> "[p]art of a program of harbor development in furtherance of a permissible trust use and would, as found by the SLC, result in a public benefit. Under these circumstances we do not think the 1967 action of the SLC can be said to be invalid under the impairment doctrine." (*Id.* at 723.)[28]

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[28] The agreement in *Heim* was held invalid on other grounds.

In 1973 the State entered into the Bolsa Chica Agreement. This was done only after extensive study, reports and planning regarding use of the Bolsa Chica area. It determined that with the present limited tidal flows 300 acres could be converted into a salt marsh area. It determined that construction of an open ocean channel would make useable an additional 230 acres, allowing the creation of a marina in the area. It took a rent-free 14 year lease on the 230 acres, which would become fee title if the channel were constructed within that time.[29]

By the exchange of lands with Signal, the lands involved were consolidated so as to make this trust use of the land feasible. The State, pursuant to Public Resources Code section 6301, then declared the balance of the area (including the 230 acre lease area) free of the public trust for commerce, navigation and fisheries. This declaration covered the 1,251.95 acres of rancho lands, which were already independent of the public trust, as well as the 412.56 acres of former tidelands and 17.93 acres of claimed former submerged lands.

The long and sinuous tideland fingers, over which the State held only the claim of public trust rights, plus a small area of former submerged lands claimed in fee, thus was exchanged for a consolidated parcel of 300 acres of fee ownership, with an option in the State to increase fee ownership to 530 acres.

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[29] If the 230 acres comes into State ownership, it will be classified as tide and submerged lands subject to the trust, pursuant to Public Resources Code § 6307. This 230 acre parcel includes 147.03 acres of former tidelands and all 17.93 acres of former submerged lands. (Exh. 14, p. 5.)

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[*52] *ABC contends that the 1973 Agreement violates the intent of this section by removing the public trust.[30] As has been previously shown in this brief, the public trust was properly terminated in Bolsa Chica. Article X, section 4 does not prohibit termination of the common law trust where it is otherwise proper. (*Atwood* v. *Hammond, supra,* 4 Cal. 2d 31, 41.)

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[30] ABC again miscites the amount of acreage by including rancho lands which were not subject to the trust. (AOB. pp. 51-52.)

ABC also contends that the "three-pronged test" applies to removal of lands from the coverage of article X, section 4. In this respect, we must first refer to Part IV D, *supra*, in which we note that the "three-pronged test" applies only to the grant or sale of ungranted tide and submerged lands.

The *Mansell* case clearly shows that the "three-pronged test" is to be applied only in regard to article XV, section 3 (now art. X, § 3). It does not apply to article XV, section 2 (now art. X, § 4). (*Mansell, supra*, 3 Cal. 3d 462, 478, 482, 484-485.) This fact was made quite clear by *County of Orange* v. *Heim, supra*, 30 Cal. App. 3d 694, 709, fn. 14. And at page 710, the court stated:

> "... *Mansell* specifically recognized the flat prohibition in article XV, *section 3 of the California Constitution against alienation of tidelands within two miles of an incorporated city* (3 Cal. 3d at p. 482) but, nevertheless, delineated three situations in which the prohibition did not apply: (1) the settlement of a genuine boundary dispute (3 Cal. 3d at pp. 480-481); (2) a situation in which the circumstances are such as to create an equitable estoppel (3 Cal. 3d at pp. 486-501); and (3) under the particular, limited circumstances there involved, a small, beneficial land exchange. Neither a boundary dispute nor equitable estoppel are involved in the case at bench. Respondents contend and the trial court found, however, the land exchange agreement here in question to be constitutional under the principles explicated in *Mansell* relating to the land exchange in that case." (Emphasis added.)

Mansell itself stated:

> "To reiterate, we conclude that when *lands within two miles of an incorporated city or town* which were subject to the ebb and flow of the tide at the date of the adoption of the Constitution — and which therefore are 'tidelands' within the meaning of *article XV, section 3*— (1) have been found and determined by the Legislature to be valueless for trust purposes and are freed from the public trust (see fn. 17, *ante*) and (2) have been or are to be reclaimed pursuant to and in

the course of a highly beneficial public program of harbor development, such lands — if they constitute a relatively small parcel of the total acreage involved — thereupon cease to be 'tidelands' within the meaning of the constitutional provision and are subject to alienation into absolute private ownership." (3 Cal. 3d 462, 485-486; emphasis added.)

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STATE OF CALIFORNIA
Department of Justice
George Deukmejian
(PRONOUNCED DUKE-MAY-GIN)
Attorney General

October 20, 1982

THE HONORABLE MARGARET J. MORRIS, Presiding Justice,
and Associate Justices of the Court of Appeal
Fourth Appellate District
Division II, Room 640
303 West Third Street
San Bernardino, CA 92401

Re: State Respondents' Supplemental Brief
Amigos de Bolsa Chica, Inc. v. Signal Properties, Inc., 4 Civ. Nos. 23146 and 23778

Dear Presiding Justice Morris and Associate Justices:

The recent Supreme Court decision in *City of Los Angeles v. Venice Peninsula Properties* (1982) 31 Cal.3d 288 was raised by appellants for the first time at oral argument. This Court granted respondents permission to file a supplemental brief discussing the effect of the *Venice Properties* decision on this case.

Venice Properties held that tidelands within a Mexican rancho are subject to the public trust easement for commerce, navigation, and fisheries. 31 Cal.3d at 302. However, the *Venice Properties* opinion has no effect on the Bolsa Chica case for two reasons. First, any third party inquiry into the effect of this recent decision on the State's 1973 Settlement Agreement must be foreclosed by the statute of limitations. Pub. Res. Code, § 6341. To hold otherwise would allow third parties to circumvent the statute of limitations and reduce it to a nullity. Second, apart from the statute of limitations, the State was a party to the *Venice Properties* case at the time the 1973 Agreement was being negotiated. Being well aware of its position in the *Venice Properties* case, the State was careful to identify and consider the tidelands within

the Rancho La Bolsa Chica ("Rancho") as part of the 1973 Settlement Agreement.

At the outset it must be observed that although the State *did* consider the tidelands within the Rancho, this is precisely the kind of issue which must be foreclosed by the statute of limitations. In essence, appellants assert that because of the recent decision in *Venice Properties*, [*2] *the State should have claimed additional acreage as tidelands.

However, even prior to the Supreme Court's *Venice Properties* decision, appellants already had asserted that the State had underestimated its acreage claims, and that the State Lands Commission therefore had erred in finding that there was equal value.[1] As respondents have set forth in their brief, the question of acreage and value was resolved by proper findings made by the agency entitled to make them. As is the case with other administrative agencies, these findings can be challenged, but only in a timely fashion; they cannot be challenged forever.

Nor should an exception to the statute of limitations be created for new court decisions, at least insofar as untimely challenges brought by third parties. The State is authorized to settle and compromise its claims and disputes. Gov. Code, § 948; *Silver v. Watson* (1972) 26 Cal. App.3d 905; *Whitson v. City of Long Beach* (1962) 200 Cal.App.2d 486, 505-506; 17 McQuillin, *Municipal Corporations* (3d ed. 1968) § 48.17 at pp. 119-120. It is specifi-

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[1] Indeed, at oral argument, counsel for appellants claimed that she could produce "maps" which would demonstrate that the State should have claimed additional acreage. Respondents deny this. However, this assertion begs the question. Appellants' complaint states that they "own homes adjacent to . . . Bolsa Chica" and that they have used the Bolsa Chica area for years. Clerk's Transcript I, p. 53. If appellants indeed possessed such maps, they should have produced them during the three-year period (from 1970 to 1973) when the State was investigating its acreage claims and holding public hearings. Exh. 1, pp. 7-8, 320-321, 323. After the Agreement was executed in 1973, appellants still failed to produce such maps. The statute of limitations did not run until 1977 in this case — four years after execution of the 1973 Agreement. Pub. Res. Code, § 6341. Appellants had a long period of time in which to produce such maps, if they existed, but failed to do so. Such assertions only demonstrate the necessity for a statute of limitations in order to lend finality to the State's boundary line and exchange agreements.

cally authorized to resolve disputes over public trust
[*3] boundaries. *Pub. Res. Code, §§ 6307, 6336, 6357. As demonstrated at length in our brief, such resolution will be impossible if subject to third party attack for all time. Under these circumstances, third parties should not be permitted to second-guess the State's administration of its public trust responsibilities after the statute has run. To hold otherwise would allow members of the public to effectively usurp the State's authority to administer the trust.

Even if the effect of the statute of limitations were disregarded, *Venice Properties* would in no way alter the posture of the present case, because the tidelands within the Bolsa Chica Rancho were in fact thoroughly considered and taken into account in the State's negotiation and consummation of the Bolsa Chica Agreement.[2] At the time of that negotiation, the State was involved as a named defendant in *Venice Properties,* as it had been since 1965, and therefore was fully aware of the issues involved therein. Accordingly, the State conducted an extensive investigation of all its claims of rights to and interests in the Bolsa Chica area, including an investigation of the tidelands within the Rancho.

In order to establish the historical character of the Bolsa Chica lands, the engineering firm of Moffatt & Nichol was engaged to perform an independent investigation of all the historic tidelands therein. Exh. 11; Exh. 1, pp. 22, 320-321.[3] The Moffatt & Nichol report (Exh. 11) included a thorough delineation of all categories of lands within Bolsa Chica, including tidelands

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[2] The State's identification of and consideration of tidelands within the Rancho is well documented in the record, as will be set forth at length in the discussion that follows. State respondents' brief (p. 28) erroneously states that the Rancho lands were not subject to the public trust. As can be seen from the record, this statement in the brief was made in error.

[3] Unless otherwise stated, all Exhibits referred to are those judicially noticed in connection with State Respondents' Demurrer to First Amended Complaint, and now before this Court.

and submerged lands both within and without the
[*4] Rancho. This identification *of tidelands and submerged lands is broken down into categories. Exh. 11, p. 87.

In addition, Moffatt & Nichol portrayed the various land classifications that had been made on a multi-colored map which is included within State Respondents' Brief as Exhibit A (a reproduction of Exhibit 12). The map graphically depicts the tidelands within the Rancho in yellow.

That the State identified the tidelands within the Rancho is established beyond doubt by the Moffatt & Nichol map, reproduced as Exhibit A. In addition, the State's consideration of tidelands within the Rancho is further substantiated by the Agreement and its exhibits. As the State Lands Commission Calendar Item recites: "The area affected by the State claims also involves a *determination* of the extent of lands included *within the Rancho* . . . ." Exh. 1, p. 320 (emphasis added). Similarly, the Agreement itself states that a portion of lands in Bolsa Chica were tidelands, "and that certain limited portions thereof *were included in the* Bolsa Chica *Rancho* Grant. . . ." Exh. 1, p. 22 (emphasis added).

From the foregoing, it is abundantly clear that the State did identify and consider the tidelands within the Rancho as part of the Bolsa Chica Settlement Agreement. Moreover, the State included in its tideland claims (disputed by Signal) all of the yellow areas identified on Exhibit A as within the Rancho with the sole exception of certain areas (portions of sloughs) which had been "cut off"[4] by the surveys of the Rancho and the

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[4] An example of sloughs which were cut off may be seen upon reference to the language of State Tideland Patent 195 (Exh. 9, page 1, last ten lines, through page 2, first ten lines). That language contains several references to cutting off sloughs as the surveyor proceeded along the northeasterly boundary of Bolsa Bay. It may be compared to Courses 47 through 62 depicted upon the federal Plat of Rancho La Bolsa Chica (Exh. 4). A review of this same area upon the Exhibit A Map discloses that the sloughs that were cut off were lesser tributaries or "fingers" that wound northerly into the Rancho. These "fingers" are to be distinguished from the main body of water in the area, Bolsa Bay.

[*5] State *tideland patent.[5] These sloughs were cut off by specific calls in the surveys establishing the Rancho and tideland patent boundaries. Exh. 11, p. 37; Exh. 1, pp. 36-37. These "cut offs" were made pursuant to established surveying practices.[6]

As is noted in *Clark on Surveying and Boundaries* (John S. Grimes, 4th ed. 1976) §§ 257-274, pp. 308-338, there are many rules that apply to the surveying of meander lines around tidewater monuments. This treatise recognizes the practical rule that streams and sloughs cannot be meandered indefinitely; when their size diminishes to non-navigable proportions they are simply cut off by running the meander line across the slough or stream. *Clark, supra,* § 264.

This is the present rule regarding the cutting off of minor sloughs and tributaries. Other cases involving cutting off streams or sloughs consider statutory grants *(People v. Morrill* (1864) 26 Cal. 336, 355), legislative grants *(City of Oakland v. Oakland Water Front Co.*
[*6] (1897) *118 Cal. 160, 175), and pueblo grants *(Knight v. United States Land Assn.* (1891) 142 U.S. 161, 207 [Field, J., concurring]). The conclusion we may draw is that the State was correct in including within the Rancho all of the most minor slough and stream areas

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[5] See 1973 Agreement, Exh. 1, p. 20 (the "landward boundary of said inlets is the ordinary high water mark and the locations where the sloughs and tributaries are crossed by the survey line shown on said plat"); see also State Lands Commission Calendar Item, Exh. 1, p. 320 ("The area affected by the State claims also involves a determination of the extent of lands included within the Rancho inasmuch as the Rancho boundary is the ordinary high water mark of Bolsa Bay (with certain exceptions where sloughs and tributaries were included within the Rancho) and such a boundary moves in location with natural changes.").

[6] In surveying the Bolsa Chica area, the surveys utilized meander lines to approximate the contours of the tidelands. Meander lines are straight lines drawn between fixed points, used to define the sinuosities of a body of water to ascertain the acreage. *People v. Ward Redwood Co.* (1964) 225 Cal.App.2d 385, 389. Further, in situations involving meander lines approximating water lines, courts have approved such approximations as long as they are close enough to be a fair approximation. See *e.g., Muchenberger v. City of Santa Monica* (1929) 206 Cal. 635.

above the point where the meander line of Bolsa Bay cut them off.

Bolsa Land Co. v. Burdick (1907) 151 Cal. 254 is instructive on the question of cutting off minor sloughs. In that case the previous owner of the same property here in question applied for an injunction against various members of the public who continually came onto the Bolsa Chica holdings on foot and by boats (which they maneuvered down the "Freeman River" drainage ditch) for the purpose of hunting waterfowl. The court noted that "the meander lines of the United States patent crossed this so-called Freeman River at its mouth or junction with a tributary slough of Bolsa Bay. The whole length, therefore, of this Freeman River or ditch was conveyed into private ownership by this patent, which thus contains a distinct negation of the claim of navigability."[7] *Bolsa Land Co. v. Burdick, supra,* at 260. The court held an injunction to be appropriate.[8]

[*7] *Indeed, the *Bolsa Land Co.* opinion also suggests that the cut-off sloughs within the Rancho were not tidal at all. The opinion states that the lands embraced by the State's Tideland Patent were "affected by the flow of the tides." *Id.* at 258. However, the Court went on to observe as follows:

"It further appeared, without contradiction, that from the *upper reaches of land, fresh water* drained down

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[7] Following the *Bolsa Land Co.* case, the Supreme Court in *Forestier v. Johnson* stated: "[t]he decision in *Bolsa Land Co. v. Burdick* [citations], and the comments of the court regarding the power of the state to sell tidelands, are based on the conclusion stated in the opinion that the waters there involved were not navigable." *Forestier v. Johnson* (1912) 164 Cal. 24, 38. It must be remembered that the State could not ignore these statements of our Supreme Court in negotiating the Settlement Agreement.

[8] Moreover, a parallel may be drawn to the later discussion in the *Bolsa Land Co.* case regarding the State's sale of swamp and overflowed lands adjacent to the shores of the ocean and its navigable bays. The Court found that reclamation of the lands required the erection of dams across very minor sloughs, "thus cutting them off from their original ocean or bay connections." *Id.* at 261. The Court held that the propriety of such actions was a matter that rested wholly in the judgment of the State. *Id.*

into these sloughs and into Bolsas Bay . . . ." *Bolsa Land Co. v. Burdick, supra,* at 258 (emphasis added).

This language by the Court, suggesting that the upper reaches of the sloughs were fresh water and nontidal, substantiates the appropriateness of cutting off these sloughs.

CONCLUSION

The statute of limitations remains a bar to the appellants' complaint as much now as it was before the *Venice Properties* case was decided. The State did consider the location of all possible tideland areas in the Bolsa Chica area, both within the Rancho La Bolsa Chica and outside the Rancho. The only tideland areas that were considered not subject to the public trust easement were minor sloughs or streams that were cut off by the Rancho plat, the Rancho patent, and the tideland patent. These areas were the tail ends of the very minor sloughs which were cut off in light of case law and surveying practice. All of the Bolsa Chica area, with the exception of these cutoffs, was valued by the State.

The factual situation in Bolsa Chica as respects Rancho tidelands stands in direct contrast to that in the *Venice Properties* case. In *Venice Properties*, the main body of water at issue (the lagoon) was itself located within the Rancho. In Bolsa Chica, the main body of water (Bolsa Bay) was located outside the Rancho, within the State's tideland patent. The *Venice Properties* case did not deal with minor fingerling sloughs and drainage channels draining into the main body of water which is located outside the Rancho.

In any event, the State had investigated all of the various categories of lands in the area, and there was
[*8] *more than ample consideration to support the Exchange Agreement. The State appraisal proceeded in accordance with the following assumptions:

1. Although the State had only an easement for commerce, navigation and fishing in most of the lands it was giving up, it valued those lands as if the State held a fee interest.

2. No deduction from value was made by reason of the poor configuration of the lands the State was giving up.

3. No increment to the value of lands the State was receiving was added by reason of the more useful shape of said lands ("plottage").

4. No value was assigned the 14 year, 230 acre lease-option which the State received. (Exh. 14, p. 2.)

Despite these factors the appraisal revealed a $1.8 million balance in favor of the State in said land exchange. (*Id.* at 14, 17.)

In sum, this was a fair exchange, yielding great benefit to the State. It considered all possible State interests within the area. It does not violate any portion of the Court's holding in *Venice Properties*. It should be allowed to stand. In any event, any inquiry into the *Venice Properties* decision must be foreclosed by the statute of limitations. To hold that third parties can rely on recent court decisions to circumvent the statute of limitations would reduce the statute to a nullity, and
[*9] eliminate the *finality which is essential to the State's ability to resolve complex tideland boundary disputes.

Respectfully submitted,

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NO. 82-708

**IN THE SUPREME COURT
OF THE
UNITED STATES**

October Term, 1982

SUMMA CORPORATION,
Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE and AMICUS CURIAE BRIEF OF AMIGOS DE BOLSA CHICA

In Support of Respondents

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Amigos de Bolsa Chica ("Amigos") respectfully requests leave to file the accompanying amicus curiae brief in support of respondents.

Amigos appeared below as amicus curiae in the proceedings before the California Supreme Court. Respondents City of Los Angeles and the State of California have consented to the filing of the accompany-

ing brief. However, Petitioner has refused to agree to Amigos' appearance as amicus curiae.

I

AMIGOS' INTEREST IN THIS PROCEEDING

Amigos is a non-profit association whose members include more than 800 citizens in the southern California area. Amigos was formed for the purpose of attempting to preserve a wetland area called Bolsa Chica near the City of Huntington Beach. Amigos has instituted litigation alleging in part that the Bolsa Chica area is impressed with a public tidelands trust easement, and the litigation is pending.

Part of the Bolsa Chica area was subject to a patent from Mexico. Thus Amigos has a direct and substantial stake in the outcome of this case.

II

THE PROPOSED AMICUS CURIAE BRIEF

Amigos' proposed brief as amicus curiae addresses three issues which have

thus far not been discussed by the parties to this case.

First, the ramifications of this case upon the Federal power to regulate navigable waterways under the Federal navigational servitude is discussed. The impact of the decision in this case on the Federal navigational servitude could be serious and far reaching.

Second, the brief discusses the reasons why California law, including the public trust easement, should be applied throughout California without regard to the source of title of the land to which the law is to be applied.

Third, the brief explains how the public trust easement has become a rule of property in California and thus should not be extinguished now.

III

CONCLUSION

For the foregoing reasons Amigos therefore requests leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

Lynda C. Martyn

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Respondents.

AMICUS CURIAE BRIEF OF AMIGOS DE BOLSA CHICA

I

PETITIONER'S ARGUMENTS, IF ACCEPTED BY THIS COURT, WOULD ADVERSELY AFFECT THE FEDERAL NAVIGATIONAL SERVITUDE

Technically speaking, the federal navigational servitude is not at issue in this case. However, because of the similarity between the California public trust easement and the federal navigational servitude, the outcome of this case will

undoubtedly affect the federal servitude. If California is prohibited from applying its public trust easement to lands granted by Mexico, the logical corollary is that the federal government must likewise be restricted in the application of the federal servitude. Moreover, the federal government would not only be prevented from applying the federal navigational servitude to lands granted by Mexico, but likewise the servitude would be inapplicable to vast areas which had once been granted by other countries, such as grants by France in the southeastern states before the Louisiana Purchase and grants by Russia in Alaska.

Petitioner's grounds for asserting that the California public trust easement is not applicable to lands granted by Mexico are equally applicable to the federal navigational servitude. However, Petitioner is incorrect as to the public trust easement, and thus both the easement and the servitude are applicable regard-

less of the source of title of the land to which they are applied.

The federal navigational servitude is similar to the California tidelands trust easement, and both derive from the same common law source. The federal navigational servitude is a power possessed by the federal government by virtue of its delegation from the states through the Commerce Clause of the U.S. Constitution. Thus the power of the federal government to enforce the federal navigational servitude can be no broader than the power of the states.

The federal navigational servitude is a broad, pervasive power of the federal government.

> "The pervasive nature of Congress' regulatory authority over national waters was more fully described in United States v. Appalachian Power Co., supra at 426-427, 85 L.Ed. 243, 61 S.Ct. 291:
>
> "[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the author-

> ity of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control . . . . [The] authority is as broad as the needs of commerce . . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."

Kaiser Aetna v. United States, 444 U.S. 164, 173 (1979).

The navigational servitude includes, for example, the right of the federal government to construct improvements in navigable waters even though the improvements adversely affect riparian landowners, Scranton v. Wheeler, 179 U.S. 141 (1900); to remove obstructions in navigable waters, South Carolina v. Georgia, 93 U.S. 4 (1876); and to provide public access to such waters, Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979). The similarity of the navigational servi-

tude to the California public trust easement is clear.

The power of the federal government under the federal navigational servitude is based upon the Commerce Clause of the U.S. Constitution. Kaiser Aetna v. United States, supra at 177. And, such federal power was delegated by the states upon the adoption of the Constitution. South Carolina v. Georgia, supra at 9. Thus, the federal power can be no broader than the states' power.

Petitioner bases its attack on the California public trust easement upon essentially two arguments. First, it asserts that the easement, if it ever existed, was extinguished because it was not confirmed in the proceedings under the 1851 Act. (Br. of Summa Corp. at 27-31.) In the present case neither the United States nor California asserted any servitude or easement interest during the proceedings under the 1881 Act, and the patent was confirmed without recognition

of any such federal or state interest. Petitioner admits:

> "Proceedings under the Act of 1851 are conclusive against the United States . . . . In absence of a reservation in the patent itself, the 1851 Act patent conveyed the entire interest of the United States in the land."

(Brief of Summa Corp. at 27)

Thus, if Petitioner were correct, the 1851 Act proceedings not only extinguished California's easement but the federal navigational servitude as well.

Petitioner's second ground of attack on the California easement is that the Treaty of Guadalupe Hidalgo prevents application of the easement to lands granted by Mexico. Petitioner bases this argument upon language in the Treaty which required that "property of every kind . . . shall be inviolably respected." (Br. of Summa Corp. at 16-18.)

Petitioner's argument applies with equal force to the federal servitude as to the California easement. The Treaty does not place any special obligations upon

California to inviolably respect the property of Mexican citizens nor does the Treaty relieve the federal government of any obligation to respect such property. The Treaty plainly applies with equal force to the federal servitude and the California easement.

In summary, the federal navigational servitude is crucial to federal regulation of navigable waters.[1] If this Court were to accept Petitioner's arguments, the logical corollary would be that the federal navigational servitude would not be applicable to any waterways which had been granted by a sovereign which preceded the United States.

The Solicitor General argues that the federal navigational servitude is applicable to land granted by Mexico although the California public trust is not. (Br.

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1 The Brief of amicus California Land Title Association at page 28, footnote 36 cites six federal regulatory programs under which the federal government regulates navigable waters.

of the United States at 28-29.) However, he fails to point out any reason for treating the California easement differently from the federal servitude other than suggesting that the federal servitude is based upon "legislative power." The meaning of his suggestion is at best unclear, especially since the federal servitude and the California easement both have the same common law source, and in fact the federal servitude is based upon common law powers delegated by the states.

Although the solicitor's argument may be flawed, his concern that the federal navigational servitude may be adversely impacted by the decision in this case is certainly apparent. We share this concern.

II

LANDS WHICH HAD BEEN GRANTED BY MEXICO ARE NEVERTHELESS SUBJECT TO CALIFORNIA LAW

In this case Petitioner is in essence arguing that lands granted by Mexico before California acquired statehood should

be exempt from significant and well established California law. Petitioner argues that the Treaty of Guadalupe Hidalgo prevents California from applying its public trust law to certain lands merely because of the source of title of such lands. This argument, however, lacks logic and support in law.

A. The Treaty of Guadalupe Hidalgo Does Not Suggest Exemption from Non-Discriminatory State Laws for Lands Granted by Mexico.

The Treaty of Guadalupe Hidalgo does not state or suggest that lands which had been granted by Mexico should be somehow uniquely exempt from state law.[2] On the contrary, Article VIII of the Treaty states that such land should be treated the same as if it belonged to citizens of the United States.

> "In the said territories, property of every kind, now belonging to Mexicans not established

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[2] Even the Solicitor General, in support of Petitioner, seems to agree with this view. (Br. of the United States at 28-30.)

> there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."

9 U.S. Stat. 922, Article VIII.

The language of a treaty should not be construed to override state law when an alternative construction is possible. Guarantee Trust v. United States 304 U.S. 126, 143 (1938); Todok v. Union State Bank, 281 U.S. 439, 455 (1929).

In the present case, the public trust easement applies equally to all land in California. The Treaty of Guadalupe Hidalgo should not be construed to provide a perpetual exemption from such regulation for land granted by Mexico, especially in view of the plain language in the Treaty.

In the Todok case, supra, the Court considered a treaty which provided that the citizens of Sweden were guaranteed the right to freely dispose of their real

property. The State of Nebraska had applied its statutes which resulted in certain conveyances of property in that state which were owned by a Swedish citizen being void. The Swedish citizen argued that the treaty prevented application of Nebraska law, but the Court held that since the state statute applied equally to U.S. citizens and non-citizens alike it was not overridden by the treaty.

> "The question remains whether the treaty operates to override the law of the State as to the disposition of homestead property. If so, it would appear to place an alien owner of a homestead in Nebraska on a better footing than a citizen of the State. This conclusion seems to us to be repugnant to the purpose of the treaty . . . the general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against citizens of the other . . . . It is not to be supposed that the treaty intended to secure the right of disposition in any manner whatever regardless of reasonable regulations in accordance with the property laws of the country of location, bearing upon aliens and citizens alike."

Todok v. Union State Bank, supra at 445.

In the present case, like the Todok case the treaty does not override state law. The Treaty of Guadalupe Hidalgo does not provide an exemption from California law for land derived from Mexican grants, and the Treaty should not be construed to give Mexican citizens greater property rights than U.S. citizens.

B. The Treaty of Guadalupe Hidalgo Does Not Prevent California from Controlling Significant Property Rights

It is well established that the Treaty of Guadalupe Hidalgo does not prevent a state from controlling significant aspects of fee ownership concerning land which had been granted by Mexico. The types of state control which have been expressly endorsed by the courts are at least as burdensome on the fee owner as is the public trust easement, and the trust easement does not conflict with the Treaty.

In Hagar v. Reclamation District 111 U.S. 701 (1883), land in California which was derived from a grant of the Mexican government had been sold by the state for

delinquent assessments under California's tideland and swampland statutes. The statutes permitted the formation of reclamation districts covering privately owned lands, including tidelands and swamplands. The supervisors of the district were empowered to have improvements constructed and maintained on the private lands and to assess the cost thereof against the land. If the assessments became delinquent, the lands could be sold to satisfy the charges. In the case, certain lands had been sold, and the former owner argued that since the land had been granted by Mexico it was exempt from California's reclamation district law under the Treaty of Guadalupe Hidalgo. This Court disagreed saying,

> "The lands granted by Mexico were not by the treaty, under which California was acquired, exempted from the control that the state exercises over all other lands."

Hagar v. Reclamation District, supra at 706.

The Hagar case clearly permits California to divest a Mexican land grantee of his title to the land. It is difficult to conceive of any state power which could be more burdensome on the fee interest. On the other hand, the public trust easement does not permit California to divest the landowner of his fee interest.

Similarly, in Amaya v. Stanolind Oil and Gas Co. 158 Fed.2d 554 (1946), the court considered the meaning of Article VIII of the Treaty of Guadalupe Hidalgo which provides that the property of Mexican citizens shall be "inviolably respected." At issue was a Texas statute of adverse possession which operated to divest planitiffs of their title to certain lands. The court concluded that the treaty did not prevent passage of "reasonable and non-discriminatory statutes regulating title and possession of land" and concluded that under the Texas statute plaintiffs had lost title. 158 Fed.2d at 558.

The public trust easement is reasonable and non-discriminatory. Plainly the trust is less intrusive on the fee interest than state control of title and possession which has already been sanctioned by this court and others.

The Solicitor General seems to agree with us to the extent that Mexican land grants are not immune from State regulation. But he seems to feel that although there is no immunity from regulation under the police power, such grants are immune from the public trust easement. (Br. of the United States at 29.) He fails, however, to present any logic or law in support of his argument other than to suggest that the public trust is a property right whereas state regulation is not. The significance of this distinction escapes us period. Governmental "regulation" often burdens property rights in ways similar to the public trust. (Note e.g. the regulations cited by the solicitor on page 29 of his brief.) Furthermore, the

Hagar case is not limited to state "regulation." Also, this court has permitted California to actually divest a property owner of his title to land granted by Mexico. Hagar supra. Certainly such state action is more detrimental to fee ownership than state action under the public trust easement, which does not encompass divestiture of the fee.

III

MEXICAN LAW IMPOSED A TIDELANDS TRUST EASEMENT IN FAVOR OF THE PUBLIC

The California Supreme Court correctly found that "the law of Mexico at the time of cession declared that the public had a right to use the tidelands; this right was similar to the common law public trust." This holding is based upon clear language of Mexican law and uncontradicted expert testimony.

Law III of Title XXVIII of Las Siete Partides, the law in effect while California was part of Mexico, provided:

> "The things which belong in common to the creatures of this

> world are the following, namely, the ... sea and its shores, for every living creature can use each of these things according as it has need of them. For this reason, every man can use the sea and its shore for fishing or for navigation, and for doing everything there which he thinks may be to his advantage."

Law VI of the same title of Las Siete Partidas provided:

> "Rivers, harbors and public highways belong to all persons in common. . ." (Las Siete Partides, CCH (Spain) (1931) pp. 820-21).

Under Mexican law, the "sea and its shore" included all lands between the low water mark and the extreme high tideline. Under Anglo-American law, tidelands extend only to the ordinary high tideline. Thus, the area covered by the Mexican "shore" is at least as broad and clearly includes all areas of tidelands protected by the Anglo-American tidelands trust. The precise boundaries of tidelands shift from time to time, so the Mexican government did not worry about excluding tidelands from

grants because Mexican law maintained the public's rights to use the tidelands covered by the grants.[3]

IV

U.S. COMMON LAW AND CALIFORNIA CASE AND CONSTITUTIONAL LAW IMPOSE A TIDELANDS TRUST EASEMENT.

The common law public trust easement in the United States is essentially the same as the Mexican trust easement discussed above in that the common law easement provides for the public's irrevocable right of commerce, navigation and fishing in navigable waters and on tidelands. For example, in Martin v. Lessee of

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3 For example, the Mexican land grant in this case stated that the area within the grant could be enclosed "without prejudice to the traversing roads and servitudes." An expert on Mexican law testified at the trial court that this was standard language routinely included in Mexican land grants designed to make it clear that the rights of the public in large tracts of land were preserved. One of the rights of the public was the right to use tidelands.

Waddell, 41 U.S. 367 (1842), this Court considered the scope of the trust with respect to public fishing rights under the laws of England and the United States and stated:

> "[A]lthough the king is the owner of this great coast, and, as a consequence of his property, hath the primary right of fishing in the sea and creeks, and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof as a public common of piscary . . . 41 U.S. at 412.

In considering the public's right of navigation this Court in Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913) stated:

> "If the public right of navigation is the dominant right, and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation." 229 U.S. at 87.

See also, Scranton v. Wheeler, 179 U.S. 141, 144 (1900) affirming that the public

easement for navigation is superior to any private title.

The public trust easement has existed in California by virtue of the common law, case law and the California Constitution. (See discussion below at Section VI.)

V

THE FEDERAL PATENTING PROCESS DID NOT EXTINGUISH THE PUBLIC TRUST EASEMENT.

A. The Federal Patent Confirmed Title as it Existed Under Mexico and Did Not Enlarge the Rights of the Property Owner.

Petitioner's rights under the federal patent are no greater now than were the rights of its predecessors under Mexican law; the land remains subject to the public trust easement. There are a number of reasons for this. First, the federal patent was merely confirmatory of the rights of the Mexican grantee under Mexican law. Moreover, the Board of Land Commissioners had no jurisdiction to remove the public trust easement from the land. Also, the patent issued to

Petitioner's predecessor in interest did not expressly or by implication extinguish the public trust easement. In fact there is no indication that the Board of Commissioners which issued the patent even considered, much less adjudicated, the extent of the public's rights in the land.

It is clear that the federal patent was merely confirmatory of the rights which the Mexican grantee had under Mexican law. The case of Knight v. United Land Association, 142 U.S. 161 (1891), which has been heavily relied upon by Petitioner, is pertinent. In the Knight case this Court considered the effect of a federal patent granted pursuant to the Act of March 3, 1851 to the owner of land under a Mexican grant. The Court held that the patent merely comfirmed the owner's rights as they had existed under Mexican law.

> "[T]he patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition

> did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government.

142 U.S. at 188, quoting from Beard v. Federy, 70 U.S. 478 (1866) (emphasis added). See also De Guyer v. Banning, 167 U.S. 723, 740 (1897).

Furthermore, the federal confirmation procedure was established to carry out the provisions of the Treaty of Guadalupe Hadalgo, and the Treaty required that rights acquired under the Mexican government should not be altered.

> "The Treaty of Guadalupe Hidalgo does not purport to divest the pueblo existing at the site of the city of San Francisco, of any rights of property, or to alter the character of the interest it may have held in any lands under the former government." Townsend v. Greeley, 72 U.S. 326, 334 (1867).

Thus, since Mexican law imposed a public trust easement upon the land, the federal

patent merely confirmed the title impressed with the easement.[4]

In fact the Board of Commissioners had no authority to do otherwise, and the Board plainly had no authority to extinguish the public trust easement. This Court has determined that the scope of jurisdiction of the Commissioners pursuant to the Act of March 3, 1851 was limited to

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[4] The Mexican grant itself clearly recognizes the public trust easement. It expressly stated that the grantees "may enclose it [the land] without prejudice to the traversing roads and servitudes." In view of this clear language and the absence of any contrary words, the patent cannot be construed to extinguish the public trust easement. This Court in Martin v. Lessee of Waddell, 41 U.S. 367 (1842) considered the scope of a patent to navigable waters and concluded that:

"It would require very plain language in these letters patents to persuade us that the public and common right of fishery in navigable waters, which has been so long and carefully guarded in England, and which was preserved in every colony founded in the Atlantic borders, was intended in this one instance to be taken away." 41 U.S. at 414.

merely confirming or rejecting claims of title, and they did not have authority to determine whether the title was subject to any trust. Townsend v. Greeley, 72 U.S. 326, 335 (1867), Freemont v. United States, 58 U.S. 541,565 (1854).

In Townsend v. Greeley, supra the plaintiff asserted title based upon a grant from the City of San Francisco which had succeeded to the rights of a Mexican pueblo. The defendant claimed title to the same land based upon a grant to his predecessor from the United States.

The Court found that even though a federal patent had confirmed the fee interest of the City of San Francisco, the city's interest was nevertheless impressed with a public trust which had been imposed on the City's predecessor, the Mexican pueblo, by Mexican law. The court held that the Board of Commissioners had no authority to discharge the trust or even decide whether the trust existed.

Furthermore, despite the Solicitor General's claims to the contrary, neither res judicata nor collateral estoppel applies to bar the ascertion of the public's rights to these tidelands because not only was the Board of Commissioners without authority to adjudicate public tidelands trust rights in areas within the Mexican grants, there is also no evidence that the Board <u>even attempted</u> to adjudicate the extent of the public's rights in these tidelands.

Despite the fact that the patent issued by the Board to Summa Corporation's predecessor in interest makes no mention of any extinguishment of public rights to use the tidelands contained in the patent, the Solicitor General's brief (at pages 21-22) attempts to establish that such public rights to the tidelands were adjudicated in the patent proceedings by emphasizing the dispute that took place at the proceedings as to where the boundary of the Mexican land grant ended. The

grant said that it ended at the sea. The dispute was thus where the edge of the sea, and thus the edge of the grant, was located, not the extent of tidal marshes within the grant. Thus, the proceedings give no indication whatsoever that the issue of any public rights to the use of the tidelands within the grant were even considered much less adjudicated.

The Solicitor General's brief argues (at pages 23-24) that the fact that the state failed to come forward at the hearings to assert the public's rights in the tidelands demonstrates that no such rights existed. This is simply a non-sequiter. The fact that the state failed to come forward to assert the public's rights in the tidelands does not show that no such rights existed; rather, it merely serves to emphasize that those rights were not even considered at the Board of Commissioner's hearings.

In summary, it is thus clear that, under Mexican law, the public's right to

use tidelands was at least as broad, if not broader, than the public's rights under the Anglo-American tidelands trust doctrine as applied by both the United States and California. Further, the public's rights to use tidelands under the Mexican equivalent of the tidelands trust was not extinguished by the Treaty of Guadalupe Hidalgo or the patent proceedings that took place pursuant thereto.

B. The Treaty of Guadalupe Hidalgo Required That the Public Trust Easement Be Imposed.

United States common law imposes the public trust easement on all tidelands and navigable waters. Illinois Central Railroad v. Illinois 146 U.S. 387, 436, 437 (1892); Martin v. Lessee of Waddell, 41 U.S. 367, 408 (1842). California law is the same. People v. California Fish Co., 166 Cal. 576 (1913). No case has ever held or even suggested that the nationality of the holder of title to tidelands could affect the existence of the public trust easement.

The Treaty of Guadalupe Hidalgo expressly required that the holders of perperty under a grant from Mexico should have the same property rights as if the land were held by a United States citizen.

> "In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."

9 U.S. Stat. 922, Article VIII.

Plainly the Treaty does not provide that the grantee of property from Mexico should have greater rights than one who holds property by a virtue of a grant from the U.S. or California. Thus the Treaty required that the public trust easement remain on lands granted by Mexico just as the trust easement was imposed on all land granted by the U.S. or California. Moreover, the federal patenting process pursuant to the Act of 1851 must have conformed

to the Treaty. Therefore, the patenting process did not extinguish the trust easement.

Not only does the plain language of the Treaty of Guadalupe Hidalgo mandate this conclusion, but a treaty must be presumed to provide equal property rights to a non-citizen as to a citizen. Todok v. Union State Bank, 281 U.S. 439 (1930). The normal purpose of a treaty is to prevent injurious discrimination by one country against the citizens of another.

> "While treaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both parties may not be able to demand against their own government, the general purpose of treaties of amity and commerce is to avoid injurious discrimination against the citizens of the other.

Todok v. Union State Bank, supra, at 454-455.

The Treaty of Guadalupe Hidalgo did not expressly provide that citizens of Mexico should be given greater property

rights than American citizens. On the contrary, the treaty required equal rights.

C. The Public Rights Which Existed Under Mexican Law and United State Common Law Were Not Extinguished By the Change of Sovereignty

The public trust easement was established by Mexican law and continued under United States common law unaffected by the fact that the sovereign administering the trust for the public benefit had changed. This is mandated by well established principles of international law and by the Treaty of Guadalupe Hidalgo.

This Court has made it clear that the public trust easement is of paramount public importance and cannot be extinguished merely by a change in the sovereign which is administering the trust for the public benefit. For example, in Martin v. Lessee of Wadell, 41 U.S. 367 (1842), this Court held that under English law the king held property under navigable waters in trust for the public although

title to the land had previously been granted to a private party. The Court further held that when the State of New Jersey became sovereign over the property it had the same obligations as the king had to protect the public rights. The cases of Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913) and New Orleans v. Louisiana, 35 U.S. 662 (1836) stand for essentially this same principle. Furthermore, the case of Townsend v. Greeley, supra is particulary pertinent. In the Townsend case land was held by a Mexican pueblo, and sovereignty passed to the City of San Francisco upon admission of California to the union. The pueblo under Mexican law had held the land in trust for the public, and the court held that the City of San Francisco succeeded to the rights and obligations of the pueblo and held the land in trust for the public.

In the case of Carver v. San Pedro Co., 151 Fed.334 (1906) the court applied this principle to land in California which

had been conveyed to a private party by the Mexican government and which was confirmed by a federal patent. The court said:

> "If it be conceded, however, that the legal title to the shore or tideland, or even the bed of said slough, passed by the Donimquez [Mexican] patent, still it was subject to the public right of navigation and the power of Congress under the commerce clause of the Constitution to regulate the same." 151 Fed. 334, 337.

The fact that California is the trustee of the public trust easement is completely consistent with the well established principle that whenever a political jurisdiction over any territory is transferred from one nation or sovereign to another, the laws concerning property continue in force until changed by the new sovereign. Chicago and Pacific Railway Co. v. McGlinn, 114 U.S. 542 (1885). Both U.S. common law and California law provide a public trust. Thus whichever of these entities is considered the "new sovereign" the public trust subsists because neither extinguished the trust.

VI

THE PUBLIC TRUST EASEMENT HAS ALWAYS EXISTED IN CALIFORNIA AND HAS BECOME A RULE OF PROPERTY.

Certain amici in behalf of Petitioner argue that historically there has been no public trust easement on lands which were granted by Mexico. They argue that this has become a rule of property which should be preserved and that the California Supreme Court has improperly reversed the rule in this case. However, exactly the opposite is true. In fact the rule of property in California is and historically has been that the public trust easement applies to lands granted by Mexico as well as other lands.

A. California Case Law and the California Constitution Have Historically and Consistently Imposed the Public Trust Easement on Lands Granted by Mexico.

Initially it should be recognized that no provision of California law, either by case or statute, has ever provided that tidelands granted by Mexico are exempt from the public trust easement. Case and

statutory law have consistently been to the contrary.

California was admitted to the Union in 1850 and shortly thereafter in 1867 the California Supreme Court stated:

> "If the Mexican Government had made any rightful disposition of lands which she held as sovereign, neither the United States nor the State, as succeeding sovereigns, could disregard it any more than in the case of other lands. But by this we do not desire to be understood as holding that the Mexican Government, or this State, has the same power of absolute alienation over lands held in virtue of their sovereignty which they have over other lands. The lands which the State holds by virtue of her sovereignty, as is well understood, is such as is covered and uncovered by the flow and ebb of the neap of ordinary tides. Such land is held by the State in trust for the benefit of the people. The right of the State is subservient to the public rights of navigation and fishery. . ."

Ward v. Mulford, 32 Cal. 365 (1867).

In addition to the common law as stated by the Ward court, in 1879 the California Constitution was amended to

include Article X, Section 4[5] - which guarantees public access to tidelands and the public right of navigation in tidewaters.

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof. Article X, Section 4 of the California Constitution.

Plainly this Constitutional section by its terms is not limited to lands not granted by Mexico, and obviously it is intended to apply regardless of the source of title of the land. No court has ever

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5 This Constitutional section was originally numbered Article XV, Section 2. In 1976 the section was renumbered to Article X, Section 4.

held that lands granted by Mexico are exempt from this Constitutional provision.

The case of City of Long Beach v. Mansell, 3 Cal.3d 462 (1970), demonstrates that the California courts have consistently held that lands granted by Mexico are subject to the public trust easement. In the Mansell case, the California Supreme Court considered whether the easement applied to certain lands which were part of Rancho Los Alamitos which had been created by a grant of the Spanish governor in 1784 which was confirmed by a decree of the Mexican government in 1833. In 1857 the U.S. District Court confirmed a claim to the Rancho which had been filed with the Board of Land Commissioners. 3 Cal.3d at 468. The Court held that certain of the lands in question which had been part of the Mexican Rancho grant were "indisputedly public tidelands." 3 Cal.3d at 481. The court conducted an extensive analysis to determine which of the lands in question were subject to the public

trust established by Article XV, Section 3 of the California Constitution and concluded that certain of the lands were subject to Article XV, Section 3. 3 Cal.3d at 487.

Likewise in Carver v. San Pedro, 151 Fed. 334 (1906) the Federal Circuit Court of Appeals considered the public's right to use certain waters in California which allegedly were derived from a Mexican patent. The court held that even if the land had been part of a Mexican patent, the river was nevertheless subject to the public right of navigation.

B. California Has Consistently Regulated All Lands in the State Alike. To Now Create a Special Exception for Land Derived from Mexico Would Throw California Law into Chaos.

Petitioner argues for a new legal principle which would single out lands once patented by Mexico to private persons for special treatment under California law. However, California has never recognized such a rule and to now require special treatment for such lands would be

incredibly disruptive to the California legal system, not only with respect to tidelands but in countless other areas as well.

California currently has numerous regulations of land in addition to the public trust easement which have always been applied without regard to the source of title. For example, California Government Code Section 66600 et seq. provides a comprehensive scheme for regulating development in San Francisco Bay. The California Coastal Act, California Public Resources Code Sections 30000 et seq. provide a regulatory program for all of the California coastline. California Civil Code Section 3479 provides that obstruction of free passage in navigable waters is a public nuisance, and California Harbors and Navigation Code Section 131 provides that obstruction of a navigable waterway is a misdemeanor. None of these California statutes provides an exemption for lands or overlying waters

which had been patented by Mexico to a private grantee.

To suddenly impose such a distinction now would result in innumerable claims for exemption from the effect of these statutes. The net result would be to deprive the governmental agencies, charged with regulating tidelands and navigable waters, of any real power. California's beaches which are now public would become a checkerboard of public and private holdings dotted with "No Trespassing" signs and crossed with barbed wire. California's rivers are now open for canoeing, white water rafting, and other forms of water-related recreation. See Hitchings v. Del Rio Woods, 55 Cal.App. 3d 560 (1976). However, they would become impassable to the public in random locations arbitrarily determined based upon Mexican land grants over one hundred years old.

The potential disruption of California property law and regulation is enormous.

Amicus California Land Title Association asserts that, "Title to over 8-1/2 million acres of California land is based upon federally-patented Mexican land grants. Although the Mexican government did not regularly convey beaches, bays, or navigable rivers and lakes into private ownership, shallow lagoons, tidal sloughs, small streams and ponds were often included within Mexican grants." (Br. of California Land Title Association at 5.)

Moreover, the rule Petitoner is arguing for would not logically be limited to tidelands, but would extend to all police power regulations. For example, California cities would have to check the source of title to a parcel of land before deciding whether they could apply their zoning laws thereto.

Plainly the far-reaching effects of petitioner's proposed new rule of law would throw land regulation in California into complete chaos. Such a rule should not be established.

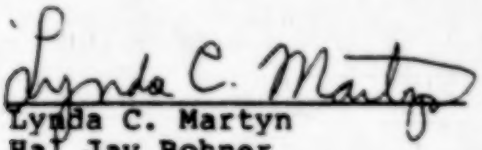
VII

SUMMARY

Petitioner is incorrect and the holding of the California Supreme Court should be affirmed. If Petitoner's arguments were accepted by this court, the results would be disastrous for the regulatory programs of not only California but many other states and the Federal government as well. The public trust easement is not unique to California but is based upon common law and thus is applicable to all states and to the Federal government through the Federal navigational servitude. If this Court were to hold that the public trust easement were not applicable to lands granted by Mexico, the same principle would require that neither the Federal government nor any other state could apply the Federal navigational servitude or the common law trust to lands granted by a prior soverign. Federal control of commerce in navigable waters would be

thrown into chaos, and the adverse effects upon the states is incalculable.

Respectfully submitted,



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No. 82-708

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner,

VS.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND AMICUS CURIAE BRIEF OF THE CALIFORNIA LAND TITLE ASSOCIATION

In Support of Petitioner On Writ of Certiorari To the Supreme Court of California

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No. 82-708

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SUMMA CORPORATION,
Petitioner,

VS.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The California Land Title Association ("CLTA") respectfully requests leave to file the accompanying Amicus Curiae Brief in support of Petitioner Summa Corporation.

CLTA appeared below as amicus curiae in the proceedings before the California Court of Appeal and the California Supreme Court. With the consent of all parties, CLTA filed an amicus brief in support of the Petition for Writ of Certiorari. Petitioner Summa Corporation and Respondent City of Los Angeles have consented to the filing of the accompanying brief. However, Respondent State of California refused to agree to CLTA's appearance as amicus curiae.

I

CLTA'S INTEREST IN THIS PROCEEDING

CLTA is a non-profit association whose members comprise 110 of the 139 title insurance companies doing business in California. The members of CLTA have issued thousands of policies insuring against the risk that wetlands and former wetlands within Mexican land grants patented by the United States pursuant to the Act of March 3, 1851, 9 Stat. 631, were encumbered by a "public trust" easement in favor of the State of California. These policies were issued and risks undertaken in reliance upon rules of law announced and often reiterated by both this Court and the California Supreme Court in decisions rendered over the course of a century. The decision below abruptly departs from these established rules by holding that federal patents confirming Mexican land grants implicitly reserved the burdensome public trust easement.

By insuring clear title to Mexican land grants, title companies have assumed liabilities totalling millions of dollars. As detailed in the accompanying brief, CLTA's interest in this proceeding stems from the harsh effects of the California court's holding on the investment-backed expectations of both landowners and title insurers, from the instability the decision creates in title to vast areas of federally-patented Mexican land grants, and from the distinct possibility that, unless checked by this Court, the public trust easement will be even further extended by the California court.

The title insurance business is predicated on the assumption that the risks involved in issuing an insurance policy can be determined. This is impossible where a court vacillates regarding fundamental legal premises governing property ownership. If title companies must now assume that any rule of property, no matter how firmly established, is

subject to abrupt and radical change, their ability to provide landowners with the security of a title policy will be seriously impaired. In sum, the members of CLTA have a direct and substantial stake in the outcome of this case.

II

THE PROPOSED AMICUS CURIAE BRIEF

CLTA's proposed brief as amicus curiae addresses three points which have not thus far been explored by the parties to this case.

First, the statewide ramifications of the California court's action are discussed. The impact of the decision below extends far beyond existing wetlands within Mexican land grants. The stability of title to former wetlands and even uplands has been called into question by virtue of the decision.

Second, the brief analyzes the implications of the California court's ruling that the public trust is not limited to the beds of navigable waters that the State of California acquired upon statehood under the Equal Footing Doctrine. By holding that the public trust is not an incident of sovereign title, the California court has removed the historical common law limitations on the scope of the public trust. If the decision stands, there exists no bar to further extensions of the trust to embrace waters that the State never owned and that are not even navigable.

Third, the proposed brief compares the decision below with California law as it existed until that decision was rendered. We do not agree with respondents' contention that the issues to be resolved in this case are matters of state law. In any event however, the California court's decision cannot stand because, in violation of the due process and taking clauses of the United States Constitution, it appropriates valuable property rights by suddenly and unexpectedly reversing rules long ago established in California property law.

In addition, the proposed brief reconciles two apparently conflicting lines of authority relied upon by the parties to this case—those cases holding that a patent issued pursuant to the 1851 Act is merely a confirmation of the Mexican grantee's property rights under Mexican law and those holding that the patent is conclusive as to the interest of the grantee. The failure of the court below to appreciate the distinction between these two lines of authority lies at the heart of its error in this case.

III

CONCLUSION

For many years CLTA has acted as spokesman for its members in matters affecting the stability and validity of land titles in California. In this capacity, CLTA has developed expertise in the history and legal bases of California land titles. CLTA is uniquely situated to comment upon the impact of the opinion below and its relationship to rules of law established by the decisions of this Court and the California Supreme Court. We therefore request leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF THE CALIFORNIA LAND TITLE ASSOCIATION

I

THE INTEREST OF THE CALIFORNIA LAND TITLE ASSOCIATION

The California Land Title Association ("CLTA") is a nonprofit association whose members comprise 110 of the 139 title insurance companies doing business in the State of California. The members of CLTA have issued thousands of policies insuring against the risk that wetlands within grants made by the Mexican government prior to the conquest of California by the United States were encumbered by a "public trust" easement in favor of the subsequently-created State of California. Because the wetlands that California acquired upon statehood under the Equal Footing Doctrine excluded all property previously

granted by Mexico,[1] title insurers concluded that the State could not legitimately claim a substantial reserved property interest in wetlands within Mexican grants that it never owned. Further, under the Act of March 3, 1851[2] the federal patents issued to confirm Mexican grants were conclusive against the United States and its successors, including the State of California.[3] Where a patent confirmed unqualified title, it was deemed unnecessary to look behind the patent to determine if it was subject to any silent reservations in favor of the State. Indeed, because the purpose of the 1851 Act was to settle and define the respective property interests of the Mexican grantees and the United States in the ceded territory,[4] and because it had been determined that all claims not presented in the federal confirmation proceedings were abandoned,[5] it seemed impossible that a claim first asserted 110 years after confirmation by a successor to the United States—the State of California—would be upheld.

Unfortunately, the members of CLTA underestimated the ingenuity of the California Supreme Court. The court conceded three points which we thought were dispositive: 1) that the public trust easement had never before been held to extend to lands the State never owned; 2) that

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[1]Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848), Art. VIII; *Knight v. United Land Assn.*, 142 U.S. 161 (1891); *San Francisco v. LeRoy*, 138 U.S. 656 (1891); *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921).

[2]"An Act to Ascertain and Settle Private Land Claims in the State of California," 9 Stat. 631 (1851) ("the 1851 Act").

[3]1851 Act, Section 15; *Beard v. Federy*, 70 U.S. (3 Wall.) 478 (1866); *Knight v. United Land Assn.*, 142 U.S. 161 (1891); *San Francisco v. LeRoy*, 138 U.S. 656 (1891).

[4]*Thompson v. Los Angeles Farming & Milling Co.*, 180 U.S. 71 77 (1901).

[5]1851 Act, Section 13; *Harvey v. Barker*, 126 Cal. 262, 58 P. 692 (1899), *aff'd sub nom. Barker v. Harvey*, 181 U.S. 481 (1901); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924); *Estrada v. Murphy*, 19 Cal. 248 (1861).

patents issued in accordance with the 1851 Act were conclusive against the State on the issue of the grantee's title to tidelands; and 3) that claims to any "normal incident of title" were abandoned if not raised in the grant confirmation proceedings. Nonetheless, the court ruled that Mexican land grants patented without reservation under the 1851 Act were subject to a heretofore unasserted but all-pervasive public trust easement in favor of the State.

CLTA's interest in this proceeding stems from the harsh effects that the California court's decision has on property rights that were once deemed unassailable, from the instability the decision creates in titles to vast areas of federally-patented Mexican land grants, and from the fact that the decision removes the only rational limit on the scope of the public trust easement—the boundaries of sovereign state ownership—thereby leaving the State free to seek even further expansions of this paramount public servitude.

A. The Decision Effectively Transfers Ownership of Wetlands Within Federally-Patented Mexican Land Grants to the State of California

The "public trust" easement, as it has developed in California law, vests most of the attributes of property ownership in the State. The State may "enter upon and possess" trust-encumbered lands to improve them for trust-related uses. *People v. California Fish Co.*, 166 Cal. 576, 588, 138 P. 79, 84 (1913). It has virtually unfettered discretion in dictating the uses to which the lands may be put. The State's options range from prohibiting any use whatsoever to occupying the property to promote any of a vast array of public purposes.[6] Under the public trust doctrine, the

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[6]The uses for which the State may appropriate lands subject to the trust have been held to be as varied as harbor development, and hydrocarbon, geothermal and mineral exploration and development, *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928),

State can even designate property as open space. *Marks v. Whitney*, 6 Cal.3d 251, 259-260, 491 P.2d 374, 380 (1971), one of the more recent California decisions discussing the nature of public rights in tidelands, emphasizes the propriety of this course of action:

> There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.

Thus the State, as trustee, may prohibit the fee owner from making any beneficial use whatsoever of trust-encumbered lands. It has been held that the State retains its trust powers even after the lands have been filled and improved. *Atwood v. Hammond*, 4 Cal.2d 31, 41, 48 P.2d 20, 26 (1935); *Long Beach v. Mansell*, 3 Cal.3d 462, 486-487, 476 P.2d 423, 440 (1970).

What is left to the landowner whose title is subjected to this permanent public servitude? Not much. Although theoretically he may use his lands as he sees fit until the State decides otherwise, in practice improvement of trust lands is halted until he pays "equal or greater value" to the State for termination of its trust interest.[1] Although he

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Mallon v. Long Beach, 44 Cal.2d 199, 282 P.2d 481 (1955), Cal. Pub. Res. Code § 6501-7062; construction of a YMCA building, *People v. Long Beach*, 51 Cal.2d 875, 338 P.2d 177 (1959); and development of public playgrounds and parks, *Los Angeles Athletic Club v. Long Beach*, 128 Cal.App. 427, 17 P.2d 1061 (1932).

[1]Under Cal. Pub. Res. Code § 6307 the State Lands Commission can terminate the public trust *provided* it receives lands of equal or greater value in exchange.

is entitled to be paid for his improvements when the State exercises its trust power to compel other uses (or no use) of his property,[8] the landowner has no right to compensation for the value of his land. Although he retains legal title to his lands notwithstanding the State's exercise of the trust, this title confers none of the incidents of property ownership, save the obligation to pay taxes.

Given the respective rights of the State and the landowner in trust-encumbered lands, it is the State that effectively owns lands that are subject to the public trust easement. The fee owner's "title,'" such as it is, is a title revocable at the will of the State. He possesses what amounts to a mere license to use his lands at the pleasure of the State.

B. The Decision Creates Instability In Title to 8½ Million Acres of Federally-Patented Mexican Land Grants

Our concern with the California court decision stems also from the vast quantity of lands affected by the ruling. Title to over 8½ million acres of California land is based on federally-patented Mexican land grants.[9] Although the Mexican government did not regularly convey beaches, bays, or navigable rivers and lakes into private ownership, shallow lagoons, tidal sloughs, small streams and ponds were often included within Mexican grants. Under the decision below, these areas are burdened by the public trust easement.

Because Mexican grants included much of the most desirable land in California, many wetlands within these grants

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[8]Cal. Pub. Res. Code § 6312.

[9]Cowan, R., *Ranchos of California* (1977). See Exhibit 1 to the CLTA brief in support of the petition for writ of certiorari, a map prepared by the United States Department of Interior in 1885 depicting confirmed Mexican land grants in California. The Mexican grants are highlighted in green.

have been filled and extensively developed. The Ballona Lagoon involved in this case is a good example. It is now known as Marina Del Rey and is the site of substantial improvements consisting of private marinas, single-family residences, high-rise condominiums, office buildings and commercial complexes.[10] Comparable developed former wetlands exist in Mexican land grants along the coast in cities such as San Diego, Oceanside, Huntington Beach, Laguna Beach, Long Beach, Santa Monica, Santa Barbara, Santa Cruz, Oakland and San Francisco.

The State of California and the City of Los Angeles contended in the proceedings below that such filled and improved former wetlands were subject to the public trust easement. As amicus curiae before the California Supreme Court, CLTA urged that these contentions be rejected so that the status of title to filled and improved lands would not be clouded and further litigation could be avoided. The court's rejection of this request was a clear invitation to the State to pursue its claims that the public trust easement exists over filled and improved lands.

The adverse ramifications of the California court's opinion extend beyond the wetlands and former wetlands included within Mexican land grants. If the public trust easement was unaffected by the confirmation proceedings conducted pursuant to the 1851 Act, it follows that other public property rights recognized under Mexican law may likewise have survived the United States' issuance of an unqualified patent. In fact, the court below suggested that *all* public rights, not simply the public trust, were reserved

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[10]See Exhibit 2 to the CLTA amicus brief in support of the Petition for Writ of Certiorari which depicts the location of the "inner bay" shown on the map of the Rancho Ballona in relationship to existing lands and improvements in Marina Del Rey.

by the Mexican government in the Rancho Ballona grant.[11] If this was the case, and we strongly doubt that it was,[12] then there is virtually no limit to the Mexican public property rights to which even uplands within Mexican land grants may be subject.[13] Moreover, if, as the court below found, the factual predicates of United States land department decisions are open for reconsideration with the most meager justification,[14] the stability of federally-patented

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[11]"In the grant of the Rancho Ballona to the Machados and Talamantes, it was provided that the grantees 'may enclose it without prejudice to the traversing roads and servitudes.' An expert on the law of Mexico who testified on behalf of defendants stated that the purpose of this language was to preserve 'the rights of the public . . . in the conveyance of large tracts of land by the authorities.' Thus, when California was ceded by Mexico, the title of defendants' predecessors was subject to the interests of the public in the tidelands and included in the grant." 31 Cal.3d at 297, 644 P.2d at 797. (footnotes omitted.)

[12]The reservation of "traversing roads and servitudes" was standard in virtually all Mexican grants. This Court has held that no broad meaning can be assigned to this language. *Barker v Harvey*, 181 U.S. 481, 495-499 (1901); *United States v. Corona Beach Co.*, 255 U.S. 472, 485-486 (1921).

[13]For instance, Laws III and VI of Title XXVIII of *Las Siete Partidas*, the cited basis for the court's conclusion that a public trust existed under Mexican law, also recognize public ownership of "public highways," "harbors," "rainwater" and "air."

[14]The California court found an ambiguity in the Rancho Ballona patent—the existence of an "inner bay" on the survey incorporated in the patent—which purportedly justified reconsidering whether the inner bay was an arm of the sea. Admittedly, there was some doubt in the grant confirmation proceedings as to the character of the "inner bay." However this uncertainty is precisely what led the General Land Office to make a determination that the area was not an arm of the sea. If the inner bay *was* an arm of the sea, then it would not even have been part of the rancho since the western boundary of the rancho was the "seashore." Thus, there is a fundamental inconsistency in the court's recognition that the inner bay was included within the rancho but was nonetheless an arm of the sea.

land titles would be seriously undermined. Any party asserting an interest in the patented land could compel the grantee to re-establish his right to a patent and the correctness of the decision of the United States land department. The grantee could find his claim recognized in one suit and rejected in another, solely because different tribunals reached different conclusions regarding whether the evidence justified the land department's decision to issue a patent. Title would be made to depend, not on the integrity of the federal patent, but on the varying perceptions of different tribunals. The result would be endless upheaval in land titles and ruinous litigation.[15]

C. The Decision Sanctions Further Extensions of the Public Trust by Rejecting the Boundaries of State Sovereign Ownership as a Limitation on the Scope of the Trust

Our concern with the decision below also arises from the court's rejection of the proposition that the scope of the public trust easement is necessarily limited to the beds of navigable waters that California acquired upon statehood by virtue of its sovereignty. If the boundaries of state sovereign ownership do not define the maximum extent of the trust, then there exists no barrier to further extensions of this paramount public property right.

The court below dismissed the fact that all prior public trust cases involved sovereign state lands as mere coincidence. It is not. Historically, the public trust existed precisely *because* of sovereign ownership of the beds of navigable waters.

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[15]It is for this very reason that it has long been held that decisions of the General Land Office on questions of fact within its jurisdiction are final and unassailable in any collateral proceeding. *Heath v. Wallace*, 138 U.S. 573 (1891); *French v. Fyan*, 93 U.S. (3 Otto) 169 (1876); *Johnson v. Drew*, 171 U.S. 94 (1898); *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. (16 Otto) 447 (1882).

The public trust doctrine arose under English common law. The Crown's title to the beds of navigable waterways was a title held for the common benefit of the people.[16] The common law principle was adopted in this country. *Shively v. Bowlby*, 152 U.S. 1 (1894). It early became settled that "[W]hen the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use. . . ." *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

Consistent with the trust capacity in which a state holds title to the beds of navigable waters, such lands may not be conveyed into private ownership in a manner that would substantially interfere with the public's right of commerce, navigation and fishing in the remaining waters. *Id.* These restrictions on the power of a state to alienate trust property *are* the public trust doctrine. The doctrine acts as a *limitation* upon a state's right to transfer property. The public trust does not "convey" an ownership interest in land to the state; it necessarily presumes that the state already owns—or once owned—the property in question.

Historically, then, the public trust was tied to sovereign title. Navigability was an essential element of this trust because only the beds of navigable bodies of water passed to a state upon admission to the Union. *Shively v. Bowlby*, 152 U.S. 1 (1894). If a body of water was not navigable,

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[16] *Attorney General v. Richards*, 8 Anst. (Eng.) 603 (1795); *Parmeter v. Attorney General*, 10 Price (Eng.) 418 (1813); Hale, *De Jure Maris* (c. 1670) Ch. IV, VI, Reprinted in Hargraves, "A Collection of Tracts Relative to the Law of England" (1788).

title to its bed remained in the United States. *United States v. Utah*, 282 U.S. 64 (1931). Determining whether a state acquired title to a waterbody upon admission to the Union is a question of federal law,[17] to be resolved by application of the federal test of navigability.[18] The federal test of navigability has provided reasonable and time-tested criteria for ascertaining what lands may be subject to the trust.

By rejecting the proposition that the public trust is an incident of title and holding that Mexican law is the source of the trust, the California court has also rejected navigability as the criterion for ascertaining the extent of the public trust easement. If the public trust is not an incident of title, and if civil law, not common law, is the origin of the trust, no inherent requirement of navigability exists. Laws III and VI of Title XXVIII of *Las Siete Partidas*, the cited basis for the state court's conclusion that a public trust easement existed under Mexican law, contain no reference to navigability. Is the trust still limited to "navigable" waters as determined by the federal test? Is it limited to waters that are navigable under some more expansive civil law test? Could it possibly extend to all waters regardless of navigability? Even assuming that

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[17]*State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1972); *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982); *United States v. Oregon*, 295 U.S. 1 (1935).

[18]The test of navigability was defined by this Court in *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) as follows:

> The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. . . .

some requirement of navigability exists, what is the boundary of a navigable waterbody subject to the trust? Is it the shoreline as defined by common law, or as defined more expansively by civil law?[19] In short, it is not clear what limitations, if any, exist on the extent of the waters that may be subject to the onerous public trust servitude, or even whether the public trust is necessarily limited to waters at all.[20] What *is* clear is that when lands are brought within the ever-expanding reach of the public trust the State may acquire essential property rights without payment of compensation.

We are not being alarmist in our concern that without the constraints afforded by sovereign title, there is no effective limit on the power of the State to usurp property under the guise of the public trust easement. The State's campaign to extend the reach of the public trust is increasingly aggressive and now encompasses lands comprising part of the public domain retained by the United States after confirmation of the Mexican land grants.[21] It is

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[19]Under common law, the shoreline is the line reached by the ordinary high tides, whereas under civil law the shore extends to the highest wash of the waves. *United States v. Pacheco*, 69 U.S. 587 (1865). The distinction is critical in marshland areas where the landward edge of the marsh typically coincides with the civil law shoreline but the bayward edge tracks the shoreline under common law. Bordering San Francisco Bay, for instance, there are 60,000 acres of marshlands and former marshlands.

[20]See n. 13, *supra*.

[21]In pending litigation the State claims that lands granted by the United States to the State as "swamp and overflowed" lands pursuant to the Arkansas Swamp Act, Act of September 28, 1850, 9 Stat. 519, are actually tidelands burdened by the public trust easement. *State of California v. Leslie Salt Co.*, Alameda County Superior Court No. 463631-9 (Consolidated). This claim is made notwithstanding the fact that the State applied for and accepted a federal swamp and overflowed patent to these lands which, of course, would have been unnecessary had they constituted tidelands acquired by the State automatically upon statehood.

not without justification that the State concludes that such claims will be favorably received by a majority of the California Supreme Court. In the last three years that court has sanctioned unprecedented expansions in the scope of this paramount public property right.[22] Moreover, after the opinion below was rendered, the California court confirmed our fear that further expansions of the trust were imminent by holding that lands that are *not* navigable under the federal test are nonetheless subject to the servitude.[23] Having declared in the decision below that the payment of compensation for the right to improve private lands is against the "policy" of the State,[23a] the California Supreme Court cannot reasonably be expected to exercise self-restraint when presented with the next opportunity to bring additional lands within the reach of the public trust. We fear that unless checked by this Court the erosion of the property rights of California citizens will continue unabated.

II

SUMMARY OF ARGUMENT

The purpose of the 1851 Act was to define and settle the respective property interests of the Mexican grantees and the United States, as successor to the Mexican government, in the ceded territory. The Act was not designed to resolve conflicting claims *among* Mexican grantees or to fix for all time the rights that attached to the ownership of property once the Mexican grants were confirmed. Accordingly, under Section 15 of the Act, the patent that issued as the

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[22]See discussion at pp. 25-26, *infra*.

[23]In *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 435, 658 P.2d 709, n.17 (1983) the court stated that "A waterway usable for pleasure boating is nevertheless a navigable waterway and protected by the public trust." Under the federal test of navigability, the waterway must be useful for commercial navigation.

[23a]31 Cal.3d at 303, 644 P.2d at 801.

culmination of the confirmation proceedings was made conclusive on the grantee, the United States and their respective successors, but not upon "third parties," that is, other Mexican grantees holding conflicting claims.

The central error of the California court was its failure to appreciate the ramifications of the fact that California claims its public trust easement as a successor to the United States and not as a third party. In reasoning that the patent to the Rancho Ballona did not terminate the United States' interest in the lands, the court, and respondents herein, rely upon a line of cases in which patents issued pursuant to the 1851 Act were held to merely confirm the rights which the Mexican grantees acquired under Mexican law. These cases are inapplicable for two reasons. First, they typically involve disputes between parties holding confirmed Mexican land grants and are, therefore, properly characterized as "third party cases" as to which the patent is not conclusive under Section 15 of the 1851 Act. Second, all the cited cases involve controversies over the water rights that the Mexican grantees acquired by virtue of their confirmed land grants. The Act was not intended to define all of the rights attaching to property ownership once a grant was confirmed, but only to settle controversies such as that here at issue—disputes over the respective property interests of the Mexican grantees and the United States or its successors. Thus a patent issued under the 1851 Act is properly characterized as "confirmatory" with respect to disputes among Mexican grantees or over rights attendant to property ownership. But with regard to the United States and its successors, including the State of California, the patent is conclusive as to all their property interests in the patented lands.

Federal law governs the outcome of this case because the effect of a federal patent issued under a federal statute upon rights claimed to be derived from the United States is at issue. Nonetheless, respondents State of California

and City of Los Angeles argue that state law controls whether or not California received a public trust interest in Ballona Lagoon. They are not correct. However, even assuming that state law legitimately plays some role in this case, the decision below cannot stand because it constitutes sudden and unforeseeable change in rules of property established by a long line of decisions of the California Supreme Court.

Until the decision below, three propositions, each of which is dispositive of this case, were firmly established by decisions of the California Supreme Court: (1) the State acquired no interest by virtue of its sovereignty in lands granted by the Mexican government; (2) a patent issued pursuant to the 1851 Act terminated any interest of the United States in the patented lands and was conclusive against the State; and (3) claims not raised in the grant confirmation proceedings were barred from future assertion. The California court's decision departs unexpectedly from each of these fundamental premises of property law. Under the decisions of this Court, when such a radical change in law serves to appropriate valuable property rights, it is unconstitutional without the tender of just compensation.

The California court's sudden reversal of these settled rules of property law also violates the doctrine that in matters affecting titles to real property, the law should be stable, predictable and not subject to significant change. Thousands of landowners have invested millions of dollars in reliance upon rules of law announced and often reiterated in decisions of the California Supreme Court. That court's attempt to rewrite 125 years of legal history should not be condoned.

III

ARGUMENT

A. As Against the State of California, a Patent Issued Pursuant to the 1851 Act is Not Merely Confirmatory, But Conclusive

Under Section 15 of the 1851 Act, a patent to a Mexican land grant is conclusive against the grantee, the United States and their respective successors. However, that patent is not binding on "third parties" claiming superior rights from the Mexican government acquired before the cession of California. The central error of the California Supreme Court was its failure to appreciate the ramifications of the fact that California claims its public trust easement as a successor to the United States. This error led the court (and respondents herein) to rely upon an irrelevant line of "third party cases" holding that patents issued pursuant to the 1851 Act are merely confirmatory of property rights which the Mexican grantees possessed under Mexican law.

As detailed in the brief of Petitioner Summa Corporation, the purpose of the 1851 Act was to settle and define the respective interests of the Mexican grantees and the United States in the ceded territory. Under the Treaty of Guadalupe Hidalgo, the United States stood in the place of the Mexican government and succeeded to all property rights which Mexico had not previously conveyed to private parties. Until the United States could ascertain the extent and nature of the Mexican-based property rights that it was bound to respect under the treaty, doubt would remain as to what property interests the United States had received from the Mexican government and, accordingly, what interests the United States could pass to its successors.

The 1851 Act was not intended to resolve conflicting claims among grantees of the Mexican government or to fix for all time the rights attached to property owner-

ship once a grant was confirmed. It was not uncommon for two or more Mexican grantees to file claims covering the same land with the Board of Land Commissioners and for these claims to be processed simultaneously by the Board. In fact, conflicting claims to the same land were sometimes confirmed by the Board and patented by the United States. *Rodriguez v. United States*, 68 U.S. (1 Wall.) 582 (1864). The "third party" exception in Section 15 of the Act reflected the intent to leave these conflicting claims for future resolution. The "third parties" referred to in Section 15 were parties claiming superior rights from Mexico that antedated the cession. *Knight v. United Land Assn.*, 142 U.S. 161, 189 (1891); *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491 (1866). Because the patent which issued as a result of the confirmation proceedings was not binding on these third parties, their rights were protected. Thus, so long as grantees submitted their claims to the Board within the two year period prescribed by Section 13 of the 1851 Act, and the claims were ultimately confirmed, they were not precluded from litigating with other parties deriving title from confirmed Mexican land grants over the boundaries of the lands described in the patents,[24] the rights attendant to property ownership,[25] or even the validity of the grants from Mexico.[26]

The situation was otherwise in disputes with the United States or its successors. The federal patent was, under the express provisions of Section 15 of the 1851 Act, conclusive against the United States. The binding effect of the patent against the United States and its successors was described

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[24] *Waterman v. Smith*, 13 Cal. 373 (1859); *Miller v. Dale*, 92 U.S. (2 Otto) 473 (1876); *Henshaw v. Bissell*, 85 U.S. (18 Wall.) 255 (1873).

[25] *Crystal Springs Land & Water Co. v. Los Angeles*, 177 U.S. 169 (1900); *Los Angeles Farming & Milling Co. v. Los Angeles*, 217 U.S. 217 (1910).

[26] *California Powder Works v. Davis*, 151 U.S. 389 (1893).

by this Court in *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 492 (1866) as follows:

> As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie.[27]

It follows from the foregoing that the patent to the Rancho Ballona, which did not reserve any public trust easement, is dispositive of this case. That patent is a complete bar to the assertion that the United States retained any property rights in the patented lands. The proceedings conducted pursuant to the 1851 Act were intended to define the full extent of the property rights which the United States acquired from Mexico. The United States was a party to the proceedings before the Board of Land Commissioners, and was authorized, indeed required, to protect public property rights in the ceded lands. In fact, an agent, skilled in Spanish and versed in Mexican law, was designated to contest the claims of Mexican grantees on behalf of the United States. 1851 Act, Section 4. Every opportunity was given to the United States to present evidence in support of its claims. The Board had judicial powers to subpoena witnesses, administer oaths, and hear evidence and was required to examine the facts and law produced on behalf of both the claimant the United States and decide the validity of the claim. 1851 Act, Sections 1-8. The United States could, but did not, raise any claim that tidelands within the Rancho Ballona were subject to a paramount

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[27] *See also United States v. Coronado Beach Co.*, 255 U.S. 472, 487-488 (1921); *San Francisco v. LeRoy*, 138 U.S. 656, 670-671 (1891); *Knight v. United Land Assn.*, 142 U.S. 161, 184 (1891).

public property right.[28] The patent issued without any such reservation. It is, by the express provisions of Section 15, conclusive against the United States.[29]

It is likewise binding on the State which claims in strict subordination to the United States as a successor in interest. The State cannot claim exemption from the conclusive effect of the patent on the ground that it is a third party protected under the provisions of Section 15. It has long been settled that because the term "third parties" refers to claimants who had superior rights under Mexican law which antedated the cession, the State of California, which did not exist at that time, can claim no protection as a third party. *Knight v. United Land Assn.*, 142 U.S. 161, 184 (1891).

According to the court below, the State acquired its public trust easement from the United States and not as a third party. Nonetheless, both that court and respondents cite what are properly characterized as "third party

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[28]The United States conducted an extensive investigation of Mexican property law prior to adopting the 1851 Act. Jones, *Report on the Subject of Land Titles in California*, (1850). Yet we are aware of no instance where the United States claimed that a navigational servitude or comparable public property right had been implicitly reserved in Mexican grants. The failure to present such a claim strongly suggests that no public trust easement was recognized in Mexican law.

[29]The question of whether the federal patent was subject to an implicit reservation of the federal navigational servitude is not an issue in this case. However, because this servitude is a substantial property interest which deprives the landowner of the "right to exclude," which is "universally held to be a fundamental element of the property right," *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979), we see no reason for exempting this servitude from the conclusive effect of the federal patent. This is not to say, however, that the United States cannot exercise its broad regulatory powers under the Commerce Clause over Ballona Lagoon. *Id.*

cases"[30] to support the conclusion that the patent acted merely as a confirmation of the Mexican grantees' rights under Mexican law and did not terminate all interest of the United States in the patented lands. We do not disagree with the holdings of those cases. However, they are not applicable here.

None of the authorities relied upon by the California court and cited by respondents involved conflicting claims between a confirmed Mexican grantee and the United States or its successor. Rather, with one exception,[31] these cases were disputes *among* Mexican grantees whose claims had been confirmed and patented under the 1851 Act. Moreover, all of the cases concerned the *water rights* which the patentees acquired by virtue of their grants from the Mexican government. We readily acknowledge that the 1851 Act did not purport to define and fix for the future *all* rights attaching to property ownership once a grantee received a federal patent. After the patents were issued, the patentees were left to litigate among themselves in state courts the nature and scope of their property rights. To this extent, then, a patent issued pursuant to the 1851 Act is properly characterized as "confirmatory" of whatever rights the claimant had acquired under Mexican law.

But this is not to say that California, as a successor to the United States, can now claim that it retains property

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[30] *Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339 (1909); *Crystal Springs Land & Water Co. v. Los Angeles*, 177 U.S. 169 (1900); *Los Angeles Farming & Milling Co. v. Los Angeles*, 217 U.S. 217 (1910); *Devine v. Los Angeles*, 202 U.S. 313 (1906); *Hooker v. Los Angeles*, 188 U.S. 314 (1903).

[31] *Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339 (1909), in which a Mexican grantee holding a federal confirmatory patent sought to enjoin the diversion of water by a party who held no title to land but who claimed rights to water use under Arizona's water appropriation laws.

interests under Mexican law that were never mentioned in the proceedings before the Board or district court and that are nowhere reflected in the conclusive patent which issued as the culmination of those proceedings. If California can assert that it is entitled under Mexican law to a pervasive easement in the patented lands, what bar exists to a like claim that lands retained by the United States are burdened with implied easements arising under Mexican law and running in favor of successors to the patentees? Congress sought to lay to rest precisely such claims when it adopted the 1851 Act. The respective property interests of the grantees and the United States in the lands ceded by Mexico were fixed, once and for all, by the proceedings conducted pursuant to the 1851 Act. It is too late now for California to claim otherwise.

B. The Decision Below Unconstitutionally Appropriates Valuable Property Rights through an Abrupt and Unforeseeable Change In Real Property Law

This case turns on the effect of a federal patent issued under a federal statute upon rights claimed to be derived from the United States. In such a case, we believe it is beyond question that federal law is controlling.[22] We further believe that the federal issues presented have already been resolved by this Court. *Knight v. United Land Assn.*, 142 U.S. 161 (1891); *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921); *San Francisco v. LeRoy*, 138 U.S. 656 (1891); *United States v. Title Insurance & Trust Co.*, 265

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[22]In contending that this case is governed by state law, respondents mistakenly rely on *Los Angeles Farming & Milling Co. v. Los Angeles*, 217 U.S. 217 (1910) and related cases holding that disputes over water rights between parties holding confirmed Mexican land grants are to be resolved in accordance with local law. As discussed at pp. 16-19, *supra*, this line of authorities is inapplicable here because no property right derived from the United States and subject to the conclusiveness provisions of Section 15 of the 1851 Act was involved in any of these cases.

U.S. 472 (1924); *Barker v. Harvey*, 181 U.S. 481 (1901). However, respondents argue that the state court opinion is not grounded in federal law but merely announces state property law principles. Regardless of how the California court opinion is interpreted, the decision cannot stand because it unconstitutionally appropriates valuable property rights by suddenly and radically departing from rules long ago established by decisions of the California Supreme Court.

This case did not raise issues of first impression for the California Supreme Court. Starting even before this Court had considered the issues raised by this case, the California Supreme Court recognized:

1. That California did not receive any sovereign interest in the beds of navigable waters included within federally-patented Mexican land grants. *Teschemacher v. Thompson*, 18 Cal. 11 (1861); *Leese v. Clark*, 18 Cal. 535 (1861); *People v. San Francisco*, 75 Cal. 388, 17 P. 522 (1888).

2. That patents issued pursuant to the 1851 Act conveyed whatever interest the United States possessed in the premises and conclusively established the title of the grantee as against claims by the State. *Leese v. Clark*, 18 Cal. 535 (1861); *Waterman v. Smith*, 13 Cal. 373 (1859); *Moore v. Wilkinson*, 13 Cal. 478 (1859); *Moore v. Smaw*, 17 Cal. 199 (1861); *Chipley v. Farris*, 45 Cal. 527 (1873); *People v. San Francisco*, 75 Cal. 388, 17 P. 522 (1888); *Teschemacher v. Thompson*, 18 Cal. 11 (1861); *Cassidy v. Carr*, 48 Cal. 339 (1874); *Los Angeles Farming & Milling Co. v. Thompson*, 117 Cal. 594, 49 P. 714 (1897), *aff'd sub nom. Thompson v. Los Angeles Farming & Milling Co.*, 180 U.S. 71 (1901).

3. That claims not raised in the confirmation proceedings conducted pursuant to the 1851 Act were

barred from future assertion. *Estrada v. Murphy*, 19 Cal. 248 (1861); *Harvey v. Baker*, 126 Cal. 262, 58 P. 692 (1899) *aff'd sub nom. Barker v. Harvey*, 181 U.S. 481 (1901).

The leading case is *Teschemacher v. Thompson*, decided 122 years ago. That case squarely presented the question of whether tidelands that had been included in a confirmatory patent to a Mexican rancho grant belonged to the grantee or passed to the State of California by reason of its sovereignty. The court ruled in favor of the grantee:

> The United States, upon the cession of the country, took the premises charged with the equitable claim of the Mexican grantees, and have since perfected the claim into a perfect title. But for such equitable claim the United States would have held the title in trust for the new State, but, the claim existing, the State and all other parties must hold in subordination to the action of the Government respecting it. The right and power of the Government to protect and thus perfect the equitable claim were superior, as we have shown, to any subsequently acquired rights or claims of the State or of individuals. 18 Cal. at 27-28.

The holding in the *Teschemacher* case was followed in *Leese v. Clark*, 18 Cal. 535 (1861). The court there considered the effect of a patent issued pursuant to the 1851 Act:

> *It [the patent] passes whatever interest the United States may then have possessed in the premises. It operates in consequence as an absolute bar to all claims under the United States having their origin subsequent to the petition.*
>
> But the patent has a still further operation and effect. It is not merely a deed of the United States, conveying whatever interest they may have held in the premises at the institution of proceedings before

> the Land Commission. It is also a record of the Government, showing its action and judgment with respect to the title of the patentees at the date of the cession. . . . This instrument, as we have stated, is the record of the Government upon the title of the patentee to the land described therein, declaring the validity of that title and that it righfully [sic] attaches to the land. *Upon all the matters of fact and law essential to authorize its issuance, it imports absolute verity; and it can only be vacated and set aside by direct proceedings instituted by the Government, or by parties acting in the name and by the authority of the Government. Until thus vacated it is conclusive, not only as between the patentee and the Government, but between parties claiming in privity with either by title subsequent.*
> 18 Cal. at 571-572. (citations omitted, emphasis added.)

These conclusions were often reiterated, even where the State was a party and raised arguments virtually identical to those advanced here. In *People v. San Francisco,* 75 Cal. 388, 17 P. 522 (1888) the State claimed that the Mexican government was without power to convey tidelands and that a patent to the pueblo of San Francisco improperly included such lands. The court responded:

> If the Mexican government had power to grant lands below the line of the ordinary tides, the state of California, upon its admission into the Union, became the owner of such tide-lands only as had not been previously disposed of by Mexico. No authority has been cited in support of the statement that, by the law of Mexico, tide-lands could not be included within pueblo lands. And, as the proper department of our government has determined that a survey, which included such lands, conformed to the decree of confirmation, that question cannot be reconsidered here. The land department has power to locate all claims confirmed. It fol-

lows that the state never had any title to the land here in controversy. 75 Cal. at 398, 17 P. at 526.

In the decision below the California court dismissed these authorities, as well as identical rulings by this Court, as holding only that California was barred from claiming *title* to tidelands within patented Mexican grants but not from asserting the existence of the public trust easement. This distinction lacks substance. The public trust easement is the functional equivalent of title, for it vests in the State the right to possess encumbered lands, to compel uses of its choosing, to prescribe who shall be allowed access, or to prevent any beneficial use whatsoever by the fee owner. *See* pp. 3-5 *supra*. As illustrated by the California court's own decision in *Harvey v. Barker*, 126 Cal. 262, 58 P. 692 (1899), *aff'd sub nom. Barker v. Harvey*, 181 U.S. 481 (1901), a right this broad *is* title. In that case the Mission Indians argued that they were not required to present their claim of a right to perpetual occupancy to the Board of Land Commissioners. In rejecting that contention the court stated:

> *If, as claimed, it were a right to possess, occupy and use land, that amounted to a title to property.* It being a title or right to property, whether in fee simple or possessory merely, derived from the Mexican government, under the act of Congress of 1851, as repeatedly held, a claim to that right was required to be presented for confirmation. 126 Cal. at 274, 58 P. at 697. (emphasis added.)

Given the foregoing authorities, the rule that the State possessed no interest, trust or otherwise, in Mexican land grants patented without reservation by the United States was considered firmly embedded in California property law. Title insurers were not alone in this conclusion. By two statutes enacted in 1917 and 1945, the California legislature conveyed to the City of Los Angeles, "all right, title and interest of the State of California held by said State by

virtue of its sovereignty, in and to all the tidelands and submerged lands" within the municipal boundaries.[33] Both statutes except any property held under a Mexican grant.[34] It is not surprising, then, that the State never claimed a reserved public trust easement in Mexican land grants until 1965 when this case commenced. Coincidence and historical accident simply cannot account for the 114 elapsed years between adoption of the 1851 Act and the State's first assertion that it inherited a public trust interest from Mexico. Obviously, *even the State believed it retained no interest, trust or otherwise, in patented Mexican land grants.*

In short, the California Supreme Court's action cannot properly be characterized as the next logical step in defining the scope of the public trust easement. To be sure, the opinion is couched in familiar "public trust" vocabulary, cites some classic "public trust" cases, and purports to be but a new application of traditional "public trust" principles. But the only California cases which bear any real resemblance to the decision below are those recent pronouncements where settled rules of property were similarly discarded in order to extend the reach of the public trust easement. In *Berkeley v. Superior Court,* 26 Cal.3d 515, 606 P.2d 362, *cert. denied,* 449 U.S. 48 (1980) the California Supreme Court overruled its decision in *Knudson v. Kearney,* 171 Cal. 250, 152 P. 541 (1915) and held that tidelands surrounding San Francisco Bay that were sold without qualification by the State pursuant to an 1872 statute authorizing the lands to be cut off from navigation and

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[33] 1917 Cal.Stat. ch. 77, p.89; 1945 Cal.Stat. ch. 1513, p.2826.

[34] The 1945 grant contained the following proviso: "excepting any property held under, through or from a Mexican grant or patent." The 1917 grant similarly provided that ". . . nothing contained herein shall in any way affect any property held or claimed under, through or from a Mexican grant or patent therefor within the present boundaries and jurisdiction of said city."

filled were subject to an implicit reservation of the public trust easement. In *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, *cert. denied* 454 U.S. 1094 (1981), the court extended the public trust servitude to lands between the high and low water lines in navigable lakes notwithstanding the provisions of California Civil Code section 830 and numerous court decisions limiting any state interest to low water. Most recently in *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 658 P.2d 709 (1983) the court held that streams navigable only for pleasure-boating purposes (and which, consequently, California did not acquire under the federal test of navigability) were subject to this paramount public property right.

The impact of such reversals in established rules of property on the investment-backed expectations of California citizens is severe. The rule that Mexican land grants were free of the public trust servitude was relied upon by thousands of landowners as well as by title insurers. The intensive development of the Marina Del Rey area involved in this case amply illustrates that substantial investments have been made on the reasonable assumption that no such encumbrance existed. By the decision below, we are now advised that tidelands within Mexican land grants have *always* been subject to this heretofore unasserted and unannounced public property right.

The federal constitutional prohibitions against taking property without due process of law and payment of just compensation cannot be so easily circumvented. In *Hughes v. Washington*, 389 U.S. 290 (1967) (Stewart, J., concurring) this Court recognized that judicial action which appropriates valuable property rights under the guise of holding that such rights never existed constitutes an unconstitutional taking:

> To the extent that the decision of the Supreme Court of Washington on that issue [of the ownership of

> accreted lands] arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. 389 U.S. at 296-297.

Recently, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) this Court found an unconstitutional taking in circumstances very similar to those of this case. The property there at issue, Kuapa Pond, was also a shallow lagoon which in its natural state was separated from the ocean by a barrier beach. Under established rules of Hawaii law, the pond was considered private property. With the acquiescence of the United States Army Corps of Engineers, private parties spent millions of dollars to dredge and fill the pond, construct a channel to the ocean and develop a private, marina-style community. The Corps later asserted that the marina was a "navigable water of the United States," that further dredging and filling operations required authorization from the Corps, and that the marina was subject to the federal navigational servitude which created a public right of access.

This Court held that although the marina could be regulated by the Corps, a right of public access could not be appropriated without payment of just compensation because: (1) the pond was shallow in its natural state and not the type of great navigable waterbody traditionally held to be incapable of private ownership; (2) the pond had always been considered private property under Hawaii law; (3) the acquiescence of the Corps in the improvement of the pond had been relied upon by landowners; and (4) the

"right to exclude" the public constituted a fundamental element of private property.

The parallels between the *Kaiser Aetna* case and this litigation are obvious. Ballona Lagoon, in its natural state, was far from a great navigable waterbody. On the contrary, it was described as "pasture" in affidavits submitted to the General Land Office in conjunction with the patenting of the rancho. Its status as private property was unquestioned until the decision below. The failure of the State to assert any reserved public trust easement led landowners to invest millions of dollars in purchasing and improving what they thought was their private property. Finally, the public trust easement is a property interest of even greater magnitude than the right to exclude at issue in *Kaiser Aetna*."[35]

In sum, the attempt of the California court to rewrite 125 years of legal history is an unconstitutional taking of valuable property rights without due process or just compensation. It is, as well, violative of the doctrine that rules of property law should be stable, predictable and not subject to radical change except for the most persuasive of reasons."[36] *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979). In *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924) this Court gave effect to this doctrine by declining

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[35]Virtually the only difference between *Kaiser Aetna* and this case is that the attempted taking was there effected by administrative, rather than judicial, action. This Court has held, however, that courts are not immune from claims that their decisions constitute an unconstitutional taking without due process of law. *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544 (1905); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944); *Hughes v. Washington*, 389 U.S. 290 (1967) (Stewart, J., concurring).

[36]Here, no persuasive reasons exist to sanction a radical departure from established California property law. Wetlands in California are already subject to an impressive list of federal and state regulatory schemes designed to prevent unnecessary development of ecologically sensitive lands. Rivers and Harbors Act of 1899, 33

the invitation of the Mission Indians to upset titles patented under the 1851 Act:

> *Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change.* Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective, and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. 265 U.S. at 486-487. (citations omitted, emphasis added).

The wisdom of this doctrine is apparent. We submit that in this case the Court should likewise decline to sanction the sudden and unforeseeable reversal of fundamental rules of property law long ago established by decisions of the California Supreme Court.

U.S.C. § 402 *et seq.*; Federal Water Pollution Control Act. 33 U.S.C. § 1251 *et seq.*; Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.*; Maritime Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. § 1431 *et seq.*; Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*; National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*; California Environmental Quality Act, Pub. Res. Code § 21000, *et seq.*; California Wetlands Preservation Act, Pub. Res. Code § 5810 *et seq.*; California Coastal Act, Pub. Res. Code § 30000 *et seq.*

IV

CONCLUSION

For all of the foregoing reasons, the judgment of the Supreme Court of California should be reversed and the case remanded for further proceedings consistent with the decision of this Court.

Respectfully submitted,

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June, 1983

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No. 82-708

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner,

VS.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION AND CITY OF LOS ANGELES,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND AMICI CURIAE BRIEF OF THE NATIONAL AUDUBON SOCIETY AND THE SIERRA CLUB

In Support of Respondents on Writ of Certiorari to the Supreme Court of California

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No. 82-708

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner,

VS.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION AND CITY OF LOS ANGELES,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The National Audubon Society and the Sierra Club request leave to file the accompanying amici curiae brief in support of respondents State of California ex rel. State Lands Commission and City of Los Angeles.

The National Audubon Society and the Sierra Club appeared below as amici curiae in the proceedings before the California Supreme Court. Respondents State of California and City of Los Angeles have consented to the filing of the accompanying brief. Although the California Land Title Association and the Pacific Legal Foundation, as well as the United States, have filed amicus curiae briefs in support of petitioner Summa Corporation, petitioner has refused to agree to the appearance of the National Audubon Society and the Sierra Club as amici curiae.

I

THE INTEREST OF THE NATIONAL AUDUBON SOCIETY AND THE SIERRA CLUB IN THIS PROCEEDING

The National Audubon Society is a non-profit New York corporation, founded in 1905, which has more than 450,000 members. The National Audubon Society has a long-standing interest in wildlife, most particularly in birds. The Sierra Club has 350,000 members, 130,000 of whom are concerned California citizens. Residents of the California coast are among the members of both the National Audubon Society and the Sierra Club.

The applicants and their respective membership share a deep concern for the preservation of California's wetland resources and in the protection of the public's interest in and right of access to the tidelands of this state. Wildlife, and birds in particular, are dependent upon wetlands, rivers and lakes for food, nesting grounds, and resting areas. Tidelands also play an important role in the ecology of the ocean, providing an effective natural cleaning mechanism for ocean water and a productive breeding ground for ocean fish. The members of applicants enjoy the undeveloped tidelands of California, including those at issue in this litigation, for hiking, fishing, swimming, bird-watching and scientific study.

Unfortunately, these wetland areas are particularly desirable for development. Approximately 67 percent of California's historic coastal wetlands have been lost statewide, and 90 percent of the historic coastal wetlands in Southern California have been destroyed. *See* Martyn and Bohner,

The Loss of Public Tidelands to Private Parties Through Unconstitutional Land Trades, 13 U.S.F.L. Rev. 39, 41 (1978). The few remaining natural tidal areas are of irreplaceable value.

Ballona Lagoon is of particular interest to applicants, because it is one of the few remaining tideland areas readily accessible to the residents of the Los Angeles metropolitan area. Ballona Lagoon, an estuary in the Marina Del Rey area of the City of Los Angeles, is a major habitat for a variety of waterfowl, including two endangered species, the California Least Tern and the Belding's Savannah Sparrow. The lagoon, of natural origin, is a remnant of an ancient coastal eco-system. (App. 173, 191). Ballona Lagoon has existed in its current form for approximately 1,000 years. (App. 192). The lagoon, although protected from the open sea by a narrow barrier beach, is subject to the tides of the Pacific Ocean. (App. 173). Ballona Lagoon has significant scientific and educational value, and has been used by the public for boating, swimming, fishing, hunting, clamming and bird-watching since the 1800's.

Applicants' interest, however, extends beyond the narrow issue of protecting what remains of Ballona Lagoon, for in this litigation petitioner has taken certain positions that applicants believe would divest California's tidelands of legal protection that has heretofore existed. In the briefs filed with this Court, petitioner, and amici curiae the California Land Title Association and the Pacific Legal Foundation, portray the public trust doctrine applied in this case as an aberration recently developed by the California Supreme Court to destroy private property rights in tidelands.

Applicants are particularly disturbed that the Solicitor General condones this effort. As representatives of the ultimate beneficiaries of the public trust in California and elsewhere, applicants believe their participation in this case would provide a much needed perspective.

II

THE PROPOSED AMICI CURIAE BRIEF

Applicants' proposed brief as amici curiae focuses on a point that has received scant, even scornful, attention from petitioner and amici curiae: The pervasiveness of the deeply-rooted doctrine that tidelands are held in trust by a sovereign for its citizenry.

The California Supreme Court's affirmation of the public trust rights in Ballona Lagoon followed well-established California property law that has received constitutional and statutory confirmation. The importance of public trust rights is shown by the rigorous protection of these rights by numerous other states. The public trust doctrine is also a part of civil law, and under Mexican rule the tidelands of Ballona Lagoon were impressed with a public trust servitude. Control over trust lands is an inherent attribute of sovereignty which the proceedings confirming title to the Rancho La Ballona grant did not extinguish. Instead, that authority passed to California upon its admission. In holding that the tidelands of Ballona Lagoon are subject to the same public trust rights as exist in all other California tidelands, the California Supreme Court did not offend the provisions of the Treaty of Guadalupe Hidalgo nor impair any federal right. Consequently, the lower court's decision should not be disturbed.

III

CONCLUSION

The National Audubon Society and the Sierra Club have often represented those who use and enjoy significant natural resources like Ballona Lagoon in cases such as this. The deep involvement of applicants in this and other California decisions applying the public trust doctrine makes applicants particularly well-qualified to comment upon the decision below. According, the National Audubon Society and the Sierra Club ask leave to file the accompanying brief as amici curiae.

Respectfully submitted,

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No. 82-708

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION AND CITY OF LOS ANGELES,
Respondents.

AMICI CURIAE BRIEF OF THE NATIONAL AUDUBON SOCIETY AND THE SIERRA CLUB

THE INTEREST OF THE NATIONAL AUDUBON SOCIETY AND THE SIERRA CLUB

The interest of the National Audubon Society and the Sierra Club is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the California Supreme Court is reported at *City of Los Angeles v. Venice Peninsula Properties*, 31 Cal. 3d 288, 644 P.2d 792 (1982).

STATEMENT OF THE CASE

Amici Curiae adopt the statement of the case of respondents.

SUMMARY OF ARGUMENT

Tidelands are a limited, exhaustible resource that uniquely serve public needs for navigation, fishing, and recreation.[1] Contrary to the argument of petitioner and those amici who support petitioner, California's rigorous protection of its coastal resources is not unique. In claiming otherwise, petitioner is asking this Court to turn its back on centuries of law. Tidelands have been granted special legal status since Justinian. England, France and Spain adhered to this tradition. Public trust cases are to be found among the first reported state cases. This Court and the state courts have recognized that a state holds tidelands in trust for its citizenry. The public trust doctrine has long been an integral part of the property law of California. Contrary to petitioner's argument, the public trust doctrine has not suddenly emerged to cloud private property interests.

Given the widespread recognition that tidal areas are *sui generis* and peculiarly subject to public use, it is not surprising that Mexican law applicable in California at the time of cession recognized the public trust. Las Siete Partidas provided "every man can use the sea and its shores . . . for doing everything there which he thinks may be to his advantage." (Las Siete Partidas, CCH (Spain) (1931) pp. 820-821). Neither the Mexican grant to petitioner's predecessors nor the later confirmation proceedings affirming the validity of the grant extinguished those rights of common use. Public trust rights cannot be terminated through silence. Guardianship of trust lands is, like the police power,

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[1] *See generally* Comment, *The Tidelands Trust; Economic Currents in a Traditional Legal Doctrine*, 21 U.C.L.A. L. Rev. 826, 885-890 (1974).

inherent in sovereignty. None of the successive sovereigns explicitly renounced the public trust, and a grant by a government in derogation of its sovereign interest may not be presumed. In fact, both the origiral Mexican grant and the confirmation proceedings expressly reserved servitudes such as the public trust easement. Thus, the tidelands of Ballona Lagoon remain subject to the public trust easement.

The decision of the California Supreme Court confirmed that petitioner has rights in the tidal areas of its property identical to those enjoyed by all other private owners of coastal property in California. This holding neither modifies California real property law, nor disparages federal rights, nor offends the Treaty of Guadalupe Hidalgo. The validity of the original Mexican patent and the confirmation of that patent under the Act of 1851 has not been questioned. Consequently, as petitioner has not claimed a "taking" in the petition for certiorari, no substantial federal question is presented. In the absence of any claimed violation of the United States Constitution, or implication of an overriding federal interest, principles of federalism require that California, like all other states, be free to apply the public trust doctrine as state geography and policy demand.

I

ARGUMENT

THE PUBLIC TRUST DOCTRINE HAS LONG MADE TIDELANDS SUBJECT TO PARAMOUNT PUBLIC RIGHTS

Petitioner Summa Corporation describes the California public trust doctrine as a "court-imposed trust" that the California Supreme Court has recently "vastly expanded" to dislodge petitioner's title to its property. (Petitioner's

Brief at 10, 11, 13). Although the issue was not raised in the petition for certiorari, the California Land Title Association ("CLTA") and the Pacific Law Foundation ("PLF") assert the decision below effected an unconstitutional taking of property, and even suggest other decisions of the California Supreme Court applying the public trust doctrine are similarly infirm. (CTLA Brief at 25-26; PLF Brief at 11-12) Although the United States refrains from contending that the California Supreme Court has violated the Fourteenth Amendment, it similarly contends the California Supreme Court has unsettled established property law by "rediscovering" ancient authorities based on the court's perception of "current policy" in an area that properly belongs to the legislative sphere. (U.S. Brief at 4, 29-30)

The depiction of the public trust doctrine as a recent and aberrational creation of the California Supreme Court is wrong. As is explained in the following section, the public trust doctrine is rooted in America's earliest judicial pronouncements; it has been rigorously observed by all states; and it has been buttressed by well-established California constitutional and statutory provisions.

A. The Public Trust Doctrine Is Widespread and Well-Established In American Law

The public trust doctrine can be traced back through the English common law and Spanish civil law to the Code of Justinian.[3] The significance of this fact is twofold. First,

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[3] *See The Public Trust in Tidal Areas: A Sometimes Submerged Doctrine*, 79 Yale L.J. 762, 763-772 (1970); MacGrady, *The Navigability Concept In The Civil And Common Law: Historic Development, Current Importance, And Some Doctrines That Don't Hold Water*, 3 Fla. St. U.L. Rev. 511, 517 (1975) [hereinafter cited as MacGrady, *The Navigability Concept*].

the persistence of the concept that the public has special, paramount rights in tidelands in a panoply of succeeding legal systems is persuasive testimony of the fundamental importance of these lands to the people of a state or nation. Second, it belies the argument that public rights in tidelands are a mere property interest that may be destroyed through silence or inattention. Instead, the public trust in such lands is governmental, existing by virtue of the sovereignty of a state or nation, and representing a "deeply inherent right" of its citizenry.[3] As this Court has noted,

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.
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> *Toomer v. Witsell*, 334 U.S. 385, 402 (1948).

The various states, although free since *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), to determine rights in the shores and beds of navigable waters according to state law, have uniformly accorded tidelands special status. The universal rule is that the states own these lands subject to a public trust, or "jus publicum", and that any conveyance by the state is subject to the same burden. *See* 1 Clark, *Waters and Water Rights* § 36.4(A), at 196-197 (1967). The public trust doctrine was early established by state courts.[4]

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[3] *Neptune City v. Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47, 53 (1972). *See also Illinois Central Railroad v. Illinois*, 146 U.S. 387, 455 (1892).

[4] *See Abbot's Ex'r. v. Doe*, 5 Ala. 393 (1843); *Commonwealth v. Inhabitants of Charlestown*, 18 Mass. (1 Pick.) 180 (1822); *Brown v. Chadbourne*, 31 Me. 9 (1849); *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Bell v. Gough*, 23 N.J.L. 624 (1852). *See also Martin v. Waddell*, 41 U.S. (16 Pet.) 366 (1842).

Although the public trust doctrine applied by the states varies, several common principles can be distilled. First, trust lands may not be alienated into private ownership unless the property will be used to promote public purposes.[5] Second, any alienation of trust property must be express, and will never be presumed.[6] Third, control of public trust lands is a sovereign, or "governmental" interest.[7] Fourth, public trust rights have not been limited to navigation and fishing. Recognized public trust uses include

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[5]*See, e.g., People ex rel. Scott v. Chicago Park Dist.*, 66 Ill. 2d 65, 360 N.E.2d 773 (1976); *State by Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d 725, 735 (1977); *International Paper Co. v. Mississippi State Highway Dept.*, 271 So. 2d 395, 398-399 (Miss. 1972), *cert. denied*, 414 U.S. 827 (1973); *Long Sault Development Co. v. Kennedy*, 212 N.Y. 1, 105 N.E. 849, 852 (1914), *error dismissed*, 242 U.S. 272 (1916); *Rhode Island Motor Co. v. City of Providence*, 55 A. 696, 697 (R.I. 1903). *See also Priewe v. Wisconsin State Land Improvement Co.*, 93 Wis. 534, 67 N.W. 918, 922 (1896).

[6]*See, e.g., Gulf Oil Corp v. State Mineral Board*, 317 So. 2d 576, 589 (La. 1974); *Nevada v. Bunkowski*, 88 Nev. 623, 503 P.2d 1231, 1237-1238 (1972); *Hume v. Rogue River Packing Co.*, 51 Or. 241, 92 P. 1065, 1069 (1907); *State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497, 499, 501 (1972); *City of Galveston v. Mann*, 135 Tex. 319, 143 S.W.2d 1028, 1033-34 (1940). *See also Robbins v. Dept. of Public Works*, 355 Mass. 328, 244 N.E.2d 577, 580 (1969).

[7]*Illinois Central Railroad v. Illinois*, 146 U.S. 387, 455 (1892). Public trust rights do not depend upon state fee ownership at some point in time, as CLTA argues. Although the federal test of navigability determines which lake and stream beds pass in fee to the states upon statehood, states have recognized public trust rights in waters that are not navigable under the federal test and which therefore have never been held in fee by the state. *See* Johnson and Austin, *Recreational Rights and Titles to Beds on Western Streams*, 7 Nat. Resources J. 1, 7-8 (1967). *See also Brown v. Chadbourne*, 31 Me. 9 (Me. 1849); *Curry v. Hill*, 460 P.2d 933, 935-936 (Okla. 1969); *Luscher v. Reynolds*, 153 Or. 625, 56 P.2d 1158, 1162 (1936); *Diona Shooting Club v. Husting*, 156 Wis. 261, 145 N.W.

swimming, picnicking, boating and other recreational uses.[8] Protection of fish and game habitat, scenic beauty and even eradication of pollution have been held to be within the scope of the public trust. *See Just v. Marinette County*, 56 Wash. 2d 7, 201 N.W.2d 761 (1972); *Township of Grosse Isle v. Dunbar & Sullivan Dredging Co.*, 15 Mich. App. 556, 167 N.W.2d 311 (1969).

Although many of these uses were not recognized under inherited English common law, the increased public appreciation of limited natural resources and demand for recreational opportunities has led to an expansion of the usages protected by the public trust doctrine. *See, e.g., Marks v. Whitney*, 6 Cal. 3d 251, 259-260, 491 P.2d 374, 380 (1971).[9] Petitioner and the CTLA greatly disparage the development of the public trust doctrine. However, the principle that the public has the right to use trust lands for purposes which are peculiar to these resources and for which there is a substantial public demand is part of the animating

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816, 819 (1914). Even in England, the public was granted the right to use nontidal rivers even though the beds were privately owned since the earliest times. 4 Clark, *Waters and Water Rights* §305.1(D), at 104 (1970).

[8] *See, e.g., Southern Idaho Fish & Game Ass'n v. Picabo Livestock Co.*, 96 Idaho 360, 528 P.2d 1295, 1298 (1974); *State ex rel. Brown v. Newport Concrete Co.*, 44 Ohio App. 2d 121, 336 N.E. 2d 453, 458 (1975); *Lamprey v. Metcalf*, 52 Minn. 181, 53 N.W. 1139, 1143 (1893); *Neptune City v. Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47, 54-55 (1972); *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P.2d 232, 239 (1969), *cert. denied*, 400 U.S. 878 (1970); *Muench v. Public Service Comm'n*, 261 Wis. 492, 53 N.W.2d 514, 522-23, *aff'd on rehearing*, 261 Wis. 515C, 55 N.W.2d 40, 45-46 (1952).

[9] *See also Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 167 (1863); *Lamprey v. Metcalf*, 52 Minn. 181, 53 N.W. 1139, 1143-1144 (1893); *Diona Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816, 820 (1914).

principle of the trust doctrine. For instance, the public won a right to access to the sea for fishing when this was the area of substantial public demand. *See* 1 Clark, *Waters and Water Rights* § 36.4(B), at 202 (1967). *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473, 477 (1970). Like other areas of the common law, the public trust doctrine is not static. *Cf. Martin v. Waddell*, 41 U.S. (16 Pet.) 366 (1842). The development of the public trust doctrine which petitioner protests is no more than an adaptation to meet changing public needs—an adaptation that has been occurring for hundreds of years.

The evolution of the public trust doctrine in California and in numerous other states is no more disruptive of private property rights and private expectations than the concurrent expansion of state zoning and regulation of private property under the police power. Indeed, the development of public trust rights is far less disruptive, since it is restricted to the beds and shores of navigable waters long held to be the object of special public control.[10] The private

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[10] *Cf. Just v. Marinette County*, 56 Wash. 2d 7, 201 N.W.2d 761 (1972) (zoning requiring preservation of lakeshore wetlands covered by the public trust held not to be an unconstitutional taking). *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), cited by CTLA for the proposition that the lower court's decision constituted a taking (CTLA Brief at 27), is inapposite. In that case this Court held the federal navigational servitude gave the public no right of access to a marina that petitioner had spent millions of dollars to create, and that, without compensation, the public could not enjoy the benefits of petitioner's improvements. In this case, no private improvements are being converted to public use, for petitioner has not improved the lands at issue. Further, public rights exist not because of improvements to Ballona Lagoon, but by virtue of the character of Ballona Lagoon in its natural and unchanged state.

property rights of petitioner have no deeper roots than public trust rights. *See Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908); *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 105 N.W.2d 143 (1960). The claim of petitioner and those writing in its support that the lower court worked a sudden reversal in well-established property law ignores the restraints long imposed on all such property in California, which are explained below.

B. Protection of Public Trust Rights Is Deeply Rooted In California Real Property Law as Well as In the California Constitution, and Is a Fundamental State Policy

From California's admission, its courts have also recognized the public trust in navigable waters and tidelands. As early as 1867 the California Supreme Court observed that tidelands are:

> . . . held by the State in trust and for the benefit of the people. The right of the State is subservient to the public rights of navigation and fishery, and theoretically, at least, the State can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them *her grantee takes them upon the same terms upon which she holds them, and of course subject to the public rights above mentioned.*

Ward v. Mulford, 32 Cal. 365, 372 (1867) (emphasis added).[11]

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[11] *See also Eldridge v. Cowell*, 4 Cal. 80, 87 (1854); *Guy v. Hermance*, 5 Cal. 73, 74 (1855). In both these cases the Court observed that tidelands conveyed into private ownership and reclaimed were subject to an action by the state for purpesture to remove the private encroachment upon the public trust rights.

The sources of this public easement are "the law of nations, and the common and civil law." *Eldridge v. Cowell*, 4 Cal. 80, 87 (1854). Although these cases and others recognized the right of the legislature to convey trust property into private ownership, such conveyance had to be explicit and in furtherance of trust purposes. *Kimball v. MacPherson*, 46 Cal. 103, 108 (1873); *Taylor v. Underhill*, 40 Cal. 471, 473 (1871). Thus, the proposition that public trust rights are retained in trust property conveyed into private ownership, described as "well established" in 1913, is rooted in the earliest decisions of the California Supreme Court. *See People ex rel. Webb v. California Fish Co.*, 166 Cal. 576, 584, 138 P. 79 (1913).

The public trust doctrine attained constitutional expression in 1879. What is now article 10, section 4 of the California Constitution provides:

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.[12]

Present article 10, section 3 of the California Constitution prohibits the grant or sale of tidelands within two

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[12]This provision, although not separately addressed in the decision below, was raised and provides an adequate and independent basis for the lower court's decision.

miles of any incorporated city or town. In 1909, the California legislature prohibited the sale of tidelands and submerged lands entirely. Cal. Pub. Res. Code § 7991 (Deering 1976). Recent statutes similarly affirm the state's interest in preserving the public's right to use tidelands.[13] Administration of the state's authority in tidelands and submerged lands is vested in respondent State Lands Commission. Cal. Pub. Res. Code § 6301 (Deering 1976).

These constitutional and statutory provisions establish that protection of California tidelands and preservation of public trust rights is a fundamental, long-established policy of the state which California courts must observe and enforce. *See Dietz v. King,* 2 Cal. 3d 29, 42, 465 P.2d 50 (1910). As is next discussed, the Ballona Lagoon tidelands were under Mexican rule impressed with a public trust that the confirmation proceedings under the Act of 1851 did not extinguish. Consequently, the California Supreme Court had the authority and, under the California Constitution, the obligation to protect public trust rights in Ballona Lagoon.[14]

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[13]*See, e.g.*, Cal. Civ. Code § 830 (Deering 1971) (creating a presumption in favor of public ownership of land between high and low tide); Cal. Gov't Code §§ 54090-54093; (Deering 1974 and 1983 Supp.) (beach access); Cal. Pub. Res. Code §§ 6008, 6210.4, 6323, 27001 (Deering 1976 and 1983 Supp.).

[14]CTLA's claim that the lower court's decision subjects all property within a former Mexican land grant to every public right recognized under Mexican law is unfounded. In 1850 California adopted English common law as its rule of decision. Cal. Civ. Code § 22.2 (Deering 1971). No Mexican public rights inconsistent with common law public rights can be recognized by California Courts. *See Lux v. Haggin,* 69 Cal. 255, 384, 10 P. 674 (1886).

II

THE TIDELANDS OF BALLONA LAGOON WERE IMPRESSED WITH A PUBLIC TRUST EASEMENT UNDER MEXICAN RULE AND THE PUBLIC TRUST WAS NOT EXTINGUISHED BY THE CONFIRMATION PROCEEDINGS

A. Under Mexican Law Prior to Cession, Private Land Grants Were Subject to Public Trust Rights

Under the Civil Law, from the Institutes of Justinian until the present time, the seashore has been common property. *Humble Oil & Refining Co. v. Sun Oil Company,* 190 F.2d 191, 194 (5th Cir. 1951), *cert. denied,* 342 U.S. 920 (1952). Las Siete Partidas, the law of highest authority in effect while California was a part of Mexico, was heir to this long tradition. It provided:

> The things which belong in common to all the living creatures of this world are the air, rain, water, and the seas and its shores; for every living creature may use them according to his wants. And therefore every man may enjoy the use of the sea and its shores, either for the purpose of fishing or navigation or doing there whatever else he may conceive advantageous to him.
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> Las Siete Partidas, Title 28, Law 3, CCH (Spain) (1931) pp. 820-821; App. at 20.

Some authorities have interpreted the language of Las Siete Partidas to prohibit any alienation of tidal areas. The Supreme Court of Texas has declared that under Mexican law the bottoms and shores of a tidal lagoon were held by Mexico and did not pass to its grantee. *Luttes v. State,* 159 Tex. 500, 324 S.W.2d 167, 169 (1958). Louisiana,

whose civil code is derived from Las Siete Partidas as well as other civil law sources, has held that property designated common, such as the sea and its shores, is neither alienable nor susceptible of private ownership. *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576 (La. 1974). *See also New Orleans Land Co. v. Board of Levee Commissioners*, 171 La. 718, 132 So. 121 (1930), *aff'd*, 283 U.S. 809 (1931) (title claimed under French and Spanish grants did not include lake bed, which is unsusceptible of private ownership).

However, even if the language of Las Siete Partidas is not interpreted so broadly, it nevertheless provides at least for a kind of property incapable of exclusive ownership. This concept is virtually identical to the public trust doctrine as it has evolved in the United States.[11] Indeed, with respect to river banks, Law 6 of Las Siete Partidas, part 3, title 28, expressly provided that although river banks may be privately owned, "nevertheless, every man has a right to use them . . . ." App. 199-200. Since the public rights in seashores were, if anything, expounded in stronger terms than public rights in river banks, the conclusion follows that if tidal areas were included within a Mexican grant, the right of every person to "enjoy the use of the sea and its shores" would remain unimpaired.

The California Supreme Court is not alone in reaching this conclusion. In *Apalachicola Land & Development Co. v. McRae*, 86 Fla. 393, 98 So. 505, 518 (1923), *error dismissed*, 269 U.S. 531 (1925), the Florida Supreme Court

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[11] *See* MacCready, *The Navigability Concept*, *supra*, at 539; *California Beach Access: The Mexican Law And The Public Trust*, 2 Ecology L.Q. 571, 604 (1972). *See also Lux v. Haggin*, 69 Cal. 255, 315-317, 10 P. 674 (1886).

concluded that under Las Siete Partidas, a grant of submerged lands and tidelands to private persons "would not exclude the public use of the lands and water and the natural products thereof."

An early California decision, albeit in dicta, similarly indicated private Mexican grants were subject to retained public rights. In *Ward v. Mulford*, 32 Cal. 365, 372 (1867), the California Supreme Court pointedly observed that despite its holding a state patentee had acquired no interest in tidelands subject to a previous Mexican grant, "we do not desire to be understood as holding that the Mexican Government, or this State, has the same power of absolute alienation over lands held in virtue of their sovereignty which they have over other lands." 32 Cal. at 372. Instead, grantees took title to "sovereign" property such as tidelands subject to public trust rights. In *Lux v. Haggin*, 69 Cal. 255, 316, 10 P. 674 (1886), the California Supreme Court again noted that under Mexican law "[t]he shores of the sea pertain . . . as to use to all." Thus, the lower court's conclusion that tidelands within Mexican land grants were, prior to cession, impressed with public trust rights fully conforms with precedent and accurately applies Mexican law.[16]

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[16] *Jover v. Insular Government*, 221 U.S. 623 (1911), confirming a grant of tidelands in the Philippines, is not to the contrary. *Jover* was concerned only with the validity of the original grant; the retention of public trust rights in the grant was not discussed. Nor does the reclamation of portions of the *Jover* grant somehow imply that under Spanish law the public trust always terminated when the land passed into private ownership. In sharp contrast to the Rancho La Ballena patent, the colonial decree awarding the *Jover* tidelands expressly authorized reclamation, and did so based on specific findings that such reclamation would not interfere with other public purposes and would promote maritime commerce. The decree even restricted the location of the fill. Improvement of dis-

B. The Confirmation of the Mexican Grant Did Not Destroy Public Trust Rights In the Ballona Lagoon Tidelands

The confirmation proceedings under the Act of March 3, 1851 did not extinguish the public trust easements in the tidelands of Rancho Ballona. Under the Treaty of Guadalupe Hidalgo, the United States was obligated to "inviolably respect" the private property rights granted by Mexico to its citizens and ensure that Mexican grantees "enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States." 9 Stat. 922, 929, Art. 8; App. B-1, p. A-26. The purpose of the confirmation proceedings under the Act of March 3, 1851 was to fulfill this obligation.

Petitioner argues that even if the original Mexican land grant was subject to a public trust easement under Mexican law, the public trust rights did not survive the confirmation proceedings under the Act of 1851 because these public rights were not presented to the Board of Land Commissioners or expressly preserved. This argument is wrong on several counts. First, the decree of confirmation issued by the Board of Land Commissioners and the United States District Court decision affirming the decree incorporated the language of the Mexican

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crete areas of tidelands pursuant to explicit authority and for public purposes such as harbor development is permissible under the public trust doctrine. *See, e.g., City of Long Beach* v. *Mansell*, 3 Cal. 3d 462, 484, 476 P.2d 423 (1970). At most, *Jover* indicates this rule was part of Spanish public trust law; it cannot be inferred from *Jover* that public trust rights could be terminated absent such express authority. *Cf. Brickell* v. *Trammel*, 77 Fla. 544, 82 So. 221, 229 (1919). (Except under special circumstances private ownership under Spanish civil law extends only to high-water mark.)

grant reserving "traversing roads and servitudes". Second, this Court has held that such public trust rights are not within the limited jurisdiction of the Board of Land Commissioners or affected by the confirmation proceedings. Third, even if the confirmation decrees had omitted the reservation for servitudes, silence does not suffice to terminate public trust rights.

The Mexican grant of Rancho La Ballona contained the following reservation: "[the grantees] may enclose it without prejudice to the traversing roads and servitudes. . . ." App. A-1, P. A-9. Under Mexican law, this reservation is "an expression of art" through which the "rights of the public are saved in the conveyance of large tracts by the authorities." (R.T. 1085) Since the rights of common usage of Las Siete Partidas were considered servitudes (R.T. 1084), public rights to use the tidelands and submerged lands of Ballona Lagoon were expressly preserved in the Mexican grant.[17]

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[17] *United States v. Coronado Beach Co.*, 255 U.S. 452 (1921), and *Barker v. Harvey*, 181 U.S. 481 (1901), do not establish that this reservation excludes a public servitude over tidelands, as the United States contends. In *Coronado Beach Co.*, the United States argued the reservation embraced a provision of Mexican law authorizing the government to make use of any portion of certain lands for the construction of public buildings. The Court merely concluded that the statutory right did not apply to the lands granted to defendant, a Mexican citizen, but only to lands conveyed to "colonists and foreigners". 255 U.S. at 486. In *Barker*, the Court concluded the reservation, although "sometimes used to express all kinds of servitudes, including therein a paramount right of occupation", did not under the circumstances of the case include an Indian right of occupancy. The Indians had abandoned their claim prior to cession and this abandonment had been recognized by the Mexican authorities, and was reflected in the Mexican grants. 181 U.S. at 488-489.

In addition, the Board of Land Commissioners established by the 1851 Act had only authority to determine the validity and boundaries of the prior Mexican land grants. The Board had no jurisdiction to assess the nature and quality of the fee title or whether it was impressed with any public trust or sovereign interest. In *Fremont v. United States,* 58 U.S. (17 How.) 541 (1854), this Court held the ownership of mineral rights in a Mexican grant was not within the jurisdiction of Board of Land Commissioners under the Act of 1851. Consequently, in an appeal from a decree of the Board of Commissioners:

> The only question before the court is the validity of the title. And whether there be any mines on this land, and if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court by the Act of 1851.
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> 58 U.S. (17 How.) at 565.

In *Townsend v. Greeley,* 72 U.S. (5 Wall.) 326 (1867), this Court again held the Board of Land Commissioners had only limited jurisdiction. At issue was whether confirmation of San Francisco's legal title had altered or extinguished the trust in which San Francisco had, under Mexican law, held the land for its inhabitants. This Court concluded that the question of whether the legal title confirmed by the Board and the reviewing courts was "charged with any trust, was not a matter upon which either board or court was called upon to pass." Thus, if the land was held subject to any trust under Mexican law, "the trust was not discharged by the confirmation and the subsequent patent." 72 U.S. (5 Wall.) at 335.

In similar proceedings under the Louisiana Land Claims Acts, this Court held that lands impressed with a public trust under a former sovereign remain subject to that trust after its cession, even though the public rights had been presented to and rejected by a confirmatory board similar to the Board of Land Commissioners.[18] *New Orleans v. United States,* 35 U.S. (10 Pet.) 662 (1836). These cases establish that the confirmation proceedings determined private, proprietary rights under a Mexican land grant, but did not affect sovereign or public trust rights.

Finally, no sovereignty, neither Mexico nor the United States nor California, has ever acted expressly to modify or extinguish the public trust servitude in Ballona Lagoon which existed under Mexican law. In the absence of such an act, conveyances of title to tidelands and submerged lands are subject to a retained public trust easement. *See, e.g., Illinois Central Railroad v. Illinois,* 146 U.S. 387 (1892); *Swan Island Club, Inc. v. Yarbrough,* 209 F.2d 698, 702 (4th Cir. 1954); *City of Berkeley v. Superior Court,* 26 Cal. 3d 515, 525, *cert. denied,* 449 U.S. 840 (1980). Further, a grant from a sovereign conveys only what has been "specifically and unequivocally delineated and nothing more." *United States v. 1,078.27 Acres of Land,* 446 F.2d 1030, 1038-39 (5th Cir. 1971), *cert. denied,* 405 U.S. 936 (1972).[19] A grant in derogation of sovereignty must be

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[18] In *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.,* 690 F.2d 1157, 1169 (5th Cir. 1982), the court described the Act of March 3, 1851, 9 Stat. 631, as being "very similar" to the Louisiana Land Claims Acts discussed in *New Orleans v. United States.*

[19] *Accord Andrus v. Charlestone Stone Products Co.,* 436 U.S. 604 617 (1978); *Great Northern Railway v. United States,* 315 U.S. 262, 272 (1942); *Walton v. United States,* 415 F.2d 121, 123 (10th Cir. 1969).

strictly construed in favor of the sovereign and the rights of its citizens. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837); *United States v. 2,899.17 Acres of Land*, 269 F. Supp. 903, 909 (M.D. Fla. 1967). This rule is particularly applicable to public trust rights. *Massachusetts v. New York*, 271 U.S. 65, 89 (1926).[20]

Petitioner's argument must founder on the fact that all three sovereigns, Mexico, the United States and California, impress lands within their control with public trust duties. Nowhere does petitioner explain how it comes to be that lands held by Mexico (which, in Las Siete Partidas, impressed tidelands with a public trust), transferred by the United States (which also recognizes the public trust), and held by California (with a long-established body of public trust care), emerged from this process free of the public trust.[21] Inasmuch as the original Mexican grant expressly preserved public trust rights, the limited jurisdiction of the Board of Land Commissioners did not encompass public trust questions, and no sovereign explicitly terminated the public trust, the Ballona Lagoon tidelands remain subject to the public trust.

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[20] *See also United States v. Holt State Bank*, 270 U.S. 49 (1926); *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioner*, 168 U.S. 346, 372 (1897); *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. 640, 648 (1893).

[21] *Cf. Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115, 118 (1926) (holding that the title of a riparian owner to a stream bed was impressed with public trust rights irrespective of whether title was derived from the state or from the United States); *Luscher v. Reynolds*, 153 Or. 625, 56 P.2d 1158, 1161-1162 (1936) (although grant by United States conveyed bed of lake not navigable by federal test, title to the lake bed was subject to the superior right of the public for commercial and recreational uses).

III

STATE LAW GOVERNS WHETHER THE BALLONA LAGOON TIDELANDS ARE SUBJECT TO THE PUBLIC TRUST

The existence of a public trust easement in the tidelands of petitioner's property should be determined by state, not federal law. The validity of the confirmation patent has not been challenged, nor does the state dispute that petitioner holds in fee the land within the boundary established by that patent. The only issue is the nature and extent of petitioner's property rights under the patent issued by the United States in confirmation of the prior Mexican grant. Such a dispute does not raise a federal question. *Los Angeles Farming & Milling Co. v. Los Angeles,* 217 U.S. 217 (1910); *Devine v. Los Angeles,* 202 U.S. 313 (1906); *Hooker v. Los Angeles,* 188 U.S. 314 (1903); *Hyman v. State Lands Commission,* 543 F. Supp. 118, 121 (C.D. Cal. 1982), *appeal pending.* The lower court's interpretation of Mexican law as applied to land title in California is controlling. *Los Angeles Farming & Milling Co. v. Los Angeles,* 217 U.S. at 227; *Luttes v. State,* 159 Tex. 500, 324 S.W.2d 167, 186 (1958).[22] A confirmatory patent does not create federal rights or title subject to interpretation under federal law. *Boquillas Land & Cattle Co. v. Curtis,* 213 U.S. 339, 344 (1909). Nor does the equal-footing doctrine require application of federal common law. *Oregon ex rel. State Land*

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[22]*Cf. Hardin v. Jordan,* 140 U.S. 371, 384 (1891) (United States grants bounded on streams and lakes are to be construed, as to their effect, according to state law); *Nevada v. Bunkowski,* 88 Nev. 623, 503 P.2d 1231, 1236-1237 (1972) (prestatehood federal patent; same).

Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371 (1977).

As this Court has observed, "[u]nder our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several states." *Id.* at 378. The public trust doctrine "is of great public importance" to the citizens of California. *Marks v. Whitney*, 6 Cal. 3d 251, 257, 491 P.2d 374 (1971). Petitioner has not presented this Court with a claim that the lower court's decision effected a "taking." The tangential federal rights claimed by petitioner through the confirmation proceedings have already been held by this Court not to present a substantial federal question. Although the United States may disagree with California's choice to protect her significant remaining tidelands and preserve the public's right of access to them, that choice is California's prerogative. *Hardin v. Jordan*, 140 U.S. 371, 382 (1891). Nothing in this case invites federal interference with that policy.

IV

CONCLUSION

The fundamental purpose of Article VIII of the Treaty of Guadalupe Hidalgo was to guarantee to the citizens of Mexico the same protection of their property rights as extended to the citizens of the United States. *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 558 (5th Cir. 1946), *cert. denied*, 331 U.S. 808 (1947). Petitioner argues for property rights greater than those enjoyed by all other owners of land on the California coast, who, by accident of history, cannot trace their title back to a Mexican grant. Since 1879 the California Constitution has made access to tidelands a public right. In holding that the tidal areas of

petitioner's property are also impressed with this public trust, the California Supreme Court worked no revolution in property rights but merely confirmed what should long have been apparent to petitioner. Its decision should not be disturbed.

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No. 82-708

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner,

VS.

STATE OF CALIFORNIA ex rel.
STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondent.

On Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER SUMMA CORPORATION AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER SUMMA CORPORATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER SUMMA CORPORATION

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation moves this Court for permission to file the annexed amicus curiae brief in support of petitioner, Summa Corporation. Petitioner, Summa Corporation, and respondent, State of California, have withheld consent.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Many of Pacific Legal

Foundation's members, contributors, and supporters have expressed concern regarding the changing and expansive application of the public trust doctrine by the State of California which results in injury to the private property rights of citizens. In order to voice these interests, the Board of Trustees of Pacific Legal Foundation, the majority of whom are attorneys, has authorized the filing of this brief.

Because the interests of petitioner focus mainly upon the federal issues involving the Equal Footing Doctrine and the finality of patents over Mexican land grants certified by the United States, Pacific Legal Foundation believes that the state's invocation of the public trust doctrine as an extension of the state's expansion of public interests over private property rights could receive inadequate attention from the parties. Whether the state may recast the character and use of private property so as to facilitate and implement the taking of private property without the necessity of having to pay for the value received is an issue which deserves briefing from as many viewpoints as possible. The increasing economic constraints upon state and local governments make the invocation and use of the public trust doctrine, implied dedications, prescriptive easements, as well as regulatory schemes, the methods for securing "public" control over valuable real property. The private property rights of innocent citizens lie in the balance. Pacific Legal Foundation believes that its position, in support of private property rights, has broad public support, and that its public policy perspective will allow it to provide the Court with a more thorough briefing of the interests at stake in this litigation. Pacific Legal Foundation has filed

amicus briefs in *San Diego Gas & Electric Company v. San Diego*, 450 U.S. 621 (1981); *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210, *cert. denied sub nom. Lyon v. California*, 454 U.S. 865 (1981); *State of California v. Superior Court (Fogerty)*, 29 Cal. 3d 240, *cert. denied*, 454 U.S. 865 (1981).

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed amicus curiae brief be granted.

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No. 82-708

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner,

vs.

STATE OF CALIFORNIA ex rel.
STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER SUMMA CORPORATION

INTEREST OF AMICUS

The interest of amicus is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the California Supreme Court is reported at *City of Los Angeles v. Venice Peninsula Properties,* 31 Cal. 3d 288 (1982).

STATEMENT OF THE CASE

Amicus curiae, Pacific Legal Foundation, adopts the statement of the case set forth by petitioner.

SUMMARY OF THE ARGUMENT

The California Supreme Court committed a taking of private property without payment of just compensation through invocation of the public trust doctrine over land never previously held by the state and confirmed to citizens under federal patent. The state may not look to the establishment of trust interests in order to circumvent the need to pay for the social planning of today. The decision of the California Supreme Court should therefore be reversed.

ARGUMENT

I

THE JUDICIAL BRANCH OF THE STATE GOVERNMENT HAS COMMITTED A TAKING OF PRIVATE PROPERTY WITHOUT PAYMENT OF JUST COMPENSATION

By way of its ruling, the state court has decided that the public trust doctrine is applicable to land never held by the state or federal government. *City of Los Angeles v. Venice Peninsula Properties,* 31 Cal. 3d 288, 291 (1982). Such a decision is a change in California property law and deprives petitioner of land held in fee since before California became a state.

The state court's expansion of the public trust doctrine is similar to the Washington Supreme Court's construction of the state constitution in *Hughes v. Washington,* 389 U.S. 290 (1967). In *Hughes,* the state court had ruled that title to accretion upon petitioners' oceanfront land vested in the state rather than in the abutting landowner. The United States Supreme Court reversed and in a concurring opinion by Justice Stewart it was stated that the state

court's decision had effected an unconstitutional taking. *Id.* at 297-98.

As with Mrs. Hughes, petitioner herein had every reason to regard its property as its own, free of any claim by the public. Prior to the state court's decision, no legal or factual authority existed to support the state's claim of ownership. While the public trust doctrine is of ancient vintage, no prior application to lands such as petitioner's had ever been subject thereto. The state court itself recognized that it was creating new law in applying the public trust doctrine to land never owned by the state. *City of Los Angeles,* 31 Cal. 3d at 296.

In its opinion the Court stated the primary issue of the case to be "whether defendants' property is subject to the public trust" and then proceeded at full tilt to the conclusion that, because mineral rights were not included in Mexican land grants, "[t]he same reasoning should apply to tidelands." *Id.* at 298. This strained logic equates to the creation of a new construction of the public trust doctrine and as in *Hughes* achieved the same result as a taking by eminent domain "by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so." *Id.* at 298. "[A] State, by ipse dixit, may not transform private property into public property without compensation . . . ." *Webbs' Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980). Neither the California Legislature by statute, nor the California courts by judicial decree, may suddenly, unexpectedly, and retroactively recharacterize the ownership of property without the payment of just compensation. "This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.*

II

THE STATE COURT'S REFUSAL TO GIVE RES JUDICATA EFFECT TO THE FEDERAL PATENT IS SO FUNDAMENTALLY UNFAIR AS TO DEPRIVE PETITIONER OF DUE PROCESS OF THE LAW

The further impact of the state court's decision is to fail to give res judicata effect to the title confirmed in and patented to the Mexican grantees by the United States pursuant to the treaty of Guadalupe Hidalgo (9 Stat. 922 (1848)) and the Act of March 3, 1851, "to ascertain and settle the private Land Claims in the State of California" (9 Stat. 631 (1851)). This failure can be termed a transgression of the Due Process Clause of the United States Constitution.

The state court's ignoring of the federal patent determinations deprives petitioner of its right to rely upon the protections afforded by the doctrine of res judicata thereby exposing petitioner's vested rights to the ever changing whims of public policy as espoused by state courts. "Where the refusal of a state court to apply res judicata results in the direct, actual and irreparable loss of property, that refusal must be said to be so fundamentally unfair as to abridge the Owners' constitutional right to due process of law." *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 482 (D. Hawaii 1978), *appeal dismissed on other grounds*. The interests of the state to effectuate public policy concerns do not justify the deprivation and abridgment of the right.

Examples of the extremes to which state courts will go to effect a transformation of private property into public property, in support of changing public policy concerns, can be found in two cases out of the Hawaii District Court.

In *Sotomura, supra,* the State of Hawaii had recognized, for many years, the location of the seaward boundary to be as described in the judgment confirming registered land, usually the mean high water mark. In an eminent domain proceeding the trial court found the seaward boundary to be the upper reaches of the wash of the waves as evidenced by the line of debris on the shore. On appeal the Hawaii Supreme Court went beyond the trial court decision and decided the seaward boundary to be at the vegetation line, substantially reducing the size of the parcels involved in the litigation. In an action brought in the Federal District Court for constitutional deprivations, the court concluded that the Hawaii Supreme Court, in its decision, had effectuated a "taking" in violation of the Fifth and Fourteenth Amendments. The District Court decision turned, in part, upon the Supreme Court's ignoring of the judgments confirming the registered status of the land.

In *Robinson v. Ariyoshi,* 441 F. Supp. 559 (D. Hawaii 1977), the state court was asked to settle a water dispute. Prior established law gave the water rights into private ownership. The state court summarily concluded that the water rights were held by the state for the benefit of the public. This sudden change in property law was determined to be a "taking" under the Fifth Amendment by the District Court for Hawaii.

Recognition is given to the state's right to define, develop, and administer the law of real property, but the state's right to change the law must be measured against the citizen's rights affected. The District Court, in both cases, recognized the new interpretations of state law to be denials of

due process as failing to follow previously well established property law.

A similar denial of due process is set forth in the re-characterization of real property law stated by the California Supreme Court. Based upon previously settled law, petitioner and those in the same class as petitioner have spent millions developing, improving, paying taxes upon, conveying, and otherwise exercising all the powers of ownership over eight and one-half million acres of property. Their exercise of property rights appeared, for more than 100 years, to be settled per the 1851 patent, confirming same. Since statehood the Legislature always possessed the right to affect the property rights attached to ownership but the Legislature would be compelled to pay compensation for any expropriation. Expropriation by judicial decision is no less a taking than when accomplished by legislative fiat. "No more can private property be so taken away by judicial decision and handed over, gratis, to the State. 'The touchstone of due process is the protection of the individual against arbitrary action of the government.' *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935." *Id.* at 585.

The extent of the property rights involved were settled at the time of confirmation by patent in 1851. The state's imposition of the public trust doctrine over such property ignores the res judicata effect of the patent proceedings thereby dramatically altering the ownership rights in the property as well as denying petitioner's due process.

III

THE STATE COURT IS MOVING TO CREATE A NEW DOCTRINE OF REAL PROPERTY LAW UNDER THE LABEL OF THE PUBLIC TRUST DOCTRINE

If a state is permitted to alter property law to include these land grants as within the public trust doctrine, the end result will only be an unimpeded continuation of the state's use of the judiciary to accomplish what the Legislature and financial realities could not do: the taking of property without just compensation. It is not difficult to foresee that the state can and will characterize almost any property possessed of water to be within the trust. Without parameters placed upon the use of what once was a limited doctrine, the state, in times of fiscal constraints, will but use the state judiciary to accomplish public projects that the public coffers cannot support.

Commencing with *Marks v. Whitney,* 6 Cal. 3d 251 (1971), the state court began to realize the potential for expansion upon this ancient doctrine. In *Marks* the scope of the public's right in tidelands was broadened to include the right to hunt, bathe, or swim and the right to preserve tidelands in their natural state for scientific study. *Id.* at 259-60.

More recently, the state's high court has begun to give new interpretation to the doctrine, so as to maximize the state's ownership of what was previously privately owned property. In pursuit of this end the state court in *City of Berkeley v. Superior Court,* 26 Cal. 3d 515 (1980), overturned existing state law in order to confirm the state's interest. Once the court had permitted itself the full discretion to pass upon the state's interest in such property

rights it appeared to have found itself breaking new ground and gathering a sense of euphoria in its excitement over the potential for further expansion of the public trust doctrine. The court was not satisfied simply to resurrect or rediscover the trust; it focused its most creative efforts toward embellishing upon and expanding the doctrine to include beds of nontidal, navigable waters. *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210, *cert. denied sub nom. Lyon v. California*, 454 U.S. 865 (1981); and *State of California v. Superior Court (Fogerty)*, 29 Cal. 3d 240, *cert. denied*, 454 U.S. 865 (1981). A fuller appreciation for the direction of what the state court had wrought can be read in the decision of *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419 (1983), in which the state not only makes claim to navigable waters but also applies the authority to "waters tributary" so as to prevent any claim of "vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust." *Id.* at 425-26.

As can be seen from a reading of the foregoing cases, the state court's ever broadening interpretation of a heretofore very limited doctrine has created a mutation. The state court's effort to impose the doctrine on land never held by the state demonstrates a further change in the character of the original doctrine.

CONCLUSION

The state court's decision constitutes a change in the property law of the state. At no time prior has state law granted to the state the right to assert the public trust doctrine over the real property never held by the state and conveyed as Mexican land grants confirmed by federal patent. The judiciary should not be permitted to accomplish what the Legislature may not do without payment of just compensation.

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STATE OF CALIFORNIA *ex rel.* STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND MOTION TO STRIKE PORTIONS OF PROPOSED BRIEF AMICUS CURIAE OF CALIFORNIA LAND TITLE ASSOCIATION.

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OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND MOTION TO STRIKE PORTIONS OF PROPOSED BRIEF AMICUS CURIAE OF CALIFORNIA LAND TITLE ASSOCIATION.

Respondent State of California *ex rel.* State Lands Commission respectfully requests that this Court deny the motion of Pacific Legal Foundation ("PLF") for leave to file a brief *amicus curiae* in this case. Further, while respondent State has withheld consent, should this Court grant the similar motion of the California Land Title Association ("CLTA"), respondent State requests that the portion of CLTA's proposed brief raising the issue of "taking without payment of just compensation" be stricken. These requests are made pursuant to Rules of the Supreme Court, Rules

21.1(a), 34.1(a) and 36.5 and the decisions of this Court holding that no brief on the merits may raise additional questions to those urged in the petition for certiorari.

Leave to File PLF's Brief *Amicus Curiae* Should Be Denied and a Portion of CLTA's Proposed Brief Stricken Because the Sole Issue to Which Each Is Devoted Is Not Raised by the Petition for Certiorari and Therefore Is Not Open for Decision by This Court.

The State requests that the motion of PLF to file its proposed *amicus* brief be denied and that, in the event the motion of CLTA to file its proposed *amicus* brief is not denied, that pages 20 to 29 be stricken, because both violate this Court's rule that the scope of such briefs must be confined to the questions to which the writ of certiorari was specifically limited.[1] *Knetsch v. United States*, 364 U.S. 361, 370 (1960).

In the instant case, PLF proposes to file an *amicus curiae* brief in which the sole issue addressed is whether the State court below "committed a taking of private property without payment of just compensation." (Summary of Argument, PLF Brief, p. 6.) Similarly, in its proposed *amicus* brief, CLTA devotes half of its argument to this same issue. (CLTA Brief, pp. 20-29.) But this issue was not raised in the petition for certiorari. Both PLF and CLTA acknowledge this fact, PLF stating that its non-issue "could receive inadequate attention from the parties" (PLF Brief, p. 2) and CLTA admitting that the issue has "not thus far been explored by the parties to this case." (CLTA Brief, p. 3.) Both are

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[1]The State has withheld consent to the filing of these amicus briefs since petitioner's counsel have made clear that they will not reconsider their decision to withhold consent to all such requests except that of CLTA.

understatements; the issue is not before this Court.

It is well settled that this Court confines itself to the grounds upon which the writ of certiorari was asked or granted, the review by this Court being no broader than that sought by petitioner. *Helis v. Ward*, 308 U.S. 365, 370 (1939); *Clark v. Williard*, 294 U.S. 211, 216 (1935); *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 494 (1933).

In this case, petitioner did not raise the "taking" issue, understanding that the State court undertook to articulate the nature and quality of title always possessed by petitioner, not to cause a change or diminution of that title. Thus petitioner's determination not to raise this issue is on firm ground and was undoubtedly well considered. Certainly petitioner's potential *amici* do not now challenge that judgment. In any event, the "taking" issue, not having been raised by petitioner, is not properly before this Court. *Teamsters v. United States*, 431 U.S. 324, 374 (1977).

Even had petitioner itself attempted to raise this new issue, which it has not, this Court would refuse to consider it. This Court so held in *Irvine v. California*, 347 U.S. 128, 129-130 (1954) as follows:

> "We granted certiorari on a petition which tendered four questions. However, petitioner's counsel has now presented two additional questions[.] . . . Neither of these was mentioned in the petition. We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition unless we limit the grant, as frequently we do to avoid settled, frivolous or state law questions. We do not take up the questions numbered 3 and 6 of petitioner's brief because they are improperly presented." *Id.* (Footnote omitted.)

An attempt by non-parties to smuggle in additional questions after certiorari is granted is an *a fortiori* case for denial of

their request to do so. As this Court stated in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 325 (1972), "We do not reach for constitutional questions not raised by the parties."

Thus, respondent State requests that this Court apply its established case law as well as its Rules 21.1(a), 34.1(a), and 36.5,[2] all of which preclude an *amicus curiae* brief from raising additional issues not contained in the petition for certiorari, to the motions now before the Court. *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 121 (1974); *J. I. Case Co. v. Borak*, 377 U.S. 426, 428-429 (1964).

Conclusion.

Since the *amicus curiae* brief proposed for filing by PLF is entirely devoted to a point not raised by the petition for certiorari, and thus is not subject to consideration by this Court, it is requested that leave to file said brief be denied.

Moreover, since the *amicus curiae* brief which CLTA proposes to file devotes half of its argument to the same ground, review of which was not sought in the petition for

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[2]Rules 21.1(a), 34.1(a) and 36.5 of the Rules of the Supreme Court provide in pertinent part as follows:

"21.1. The petition for writ of certiorari shall contain, in the order here indicated:

"(a) The questions presented for review[.] . . . Only the questions set forth in the petition or fairly included therein will be considered by the Court."

"34.1. A brief of an appellant or petitioner on the merits shall comply in all respects with Rule 33, and shall contain in the order here indicated:

"(a) The questions presented for review[.] . . . The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. . . ."

"36.5 All briefs, motions, and responses filed under this Rule [Brief of an Amicus Curiae] shall comply with the applicable provisions of Rules 33, 34, and 42[.] . . ."

certiorari and upon which this Court will not pass, it is requested that should this Court not deny its motion, that pages 20 to 29 be stricken.

DATED: June 14, 1983.

Respectfully submitted,

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Office Supreme Court, U.S.
FILED
SEP 14 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-708

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner

VS.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE URGING AFFIRMANCE

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE URGING AFFIRMANCE

This brief is submitted by the State of Texas, by and through the Attorney General of Texas, Jim Mattox.

QUESTION PRESENTED

Does California hold a public trust interest in the tidelands located within a former Mexican grant which was originally acquired by private owners from the Mexican government and subsequently patented to those individuals by the United States government in accordance with the Treaty of Guadalupe Hidalgo?

INTEREST OF AMICUS CURIAE

Title to more than twenty-six million acres of land in Texas is based on Spanish and Mexican land grants. Taylor, *The Spanish Archives of the General Land Office of Texas*, (1955) p. 2. Texas courts, therefore, have long been involved in interpreting Spanish and Mexican law as it pertains to these grants. In this regard Texas courts have recognized the existence of a public trust doctrine under Spanish and Mexican law and have based their holdings upon it. The public trust interest is a concept so thoroughly incorporated into Texas law that a decision at this juncture extinguishing that trust under Spanish and Mexican grants would wreak havoc to more that a century of legal precedent. It is, therefore, of paramount concern to the State of Texas that this Court either recognize the existence of a public trust doctrine under Mexican and Spanish law or limit any decision so that it will not erode the public trust doctrine as it has evolved in Texas.

SUMMARY OF THE ARGUMENT

At issue in the present case is whether the law in effect in Mexico at the time of the grant of Balloona Lagoon incorporated a version of the public trust doctrine which would have attached to the subject property. Texas courts have resolved many of the issues inherent in this inquiry as they have interpreted Spanish and Mexican land grants in light of the law in effect at the time of those grants. We feel, therefore, it will be insightful to examine those Texas decisions even though they are not binding on this Court. Subsequent developments of law in Texas that rely upon the existence of a public trust doctrine under Spanish and Mexican law will be outlined.

The public trust doctrine is not easily summarized. It arises from an acknowledgment that there is a strong public interest in the waterways of a nation. Land that is covered by those waterways or in some instances adjacent to the waterways is held by the sovereign in trust for the use of the general public. Texas has long acknowledged the existence of this doctrine and has found the roots to be in both civil and common law.

In his Amicus brief on the merits of this case, the Solicitor General has misstated the role that Spanish and Mexican law play in interpreting Spanish and Mexican land grants. It is well established in Texas that the law in effect at the time of the grant of land is the controlling law for interpretations of that grant.

Public trust notions under Mexican and Spanish civil law have played an integral part in the development of Texas law governing definition and allocation of rights in the state's natural resources. Particularly pertinent examples include the determination of public and private rights in coastal areas along the Texas Gulf of Mexico and in the many inland watercourses in the state.

Several statutes have been enacted in Texas that rely on the public trust's application to Spanish and Mexican grants as well as all other grants. The clearest examples of this are TEX. NAT. RES. CODE §33.001 (Vernon's, 1978)(See Appendix A) and TEX. PARKS & WILD. CODE §1.011 (Vernon's, 1976)(See Appendix B). The language employed in §33.001 and to a lesser degree in §1.011 mirrors the traditional principles of public trust.

The Texas Open Beaches Act, Chapter 61 of the TEX.NAT.RES. CODE (Vernon's, 1978)establishes the policy that the state must protect the beaches on the Gulf Coast for the use of the general public. (See Appendix C) The Texas Water Rights Adjudication Act TEX.

WATER CODE §5.301 et seq. (Vernon's Supp. 1982-83) relies in a more complex way upon the distinction that exists between the civil law public trust and the common law. (See Appendix D) In each of these enactments, however, the legislature has relied upon the existence of public trust under both Spanish and Mexican law and under the common law.

Texas courts have shaped two doctrines that are based upon public trust theory and acknowledge the need to apply the law in effect at the time of the grant. In one instance they have set up two separate means of determining where the shoreline is. One that follows the Spanish and Mexican rule and is applicable to early grants and a different measure for those grants made after Texas became a Republic.

The other doctrine is a compromise of the conflicting rules for ascertaining ownership by the State of all navigable streams. This is the "30-foot" rule. Each of these doctrines will be discussed at length below to demonstrate the ways in which Texas relies upon the existence of the public trust doctrine in both of its predecessors, the civil law and the common law.

The California Supreme Court has found that the State is the trustee for the public's interest in tidely influenced land which was granted under a Mexican grant. There is no Texas case involving the fact situation presented by the present case. As will become apparent to this Court a decision undermining the existence of public trust under Spanish and Mexican law would have a disruptive effect in Texas.

ARGUMENT AND AUTHORITIES

A. The Law in Effect at the Time of the Grant Controls.

The threshold question to be addressed is what law controls in this lawsuit. The Solicitor General has said that the only reason to look to Mexican law is to resolve ambiguity in the confirmation decree or patent. (Brief on the merits for the United States p. 6) In a footnote he further states that federal law should control because of the federal confirmation proceeding.

Both of these positions are incorrect. It was agreed by the parties and acknowledged by the courts that Mexican law did govern the interpretation of the grant. (*See e.g.*, Petitioner's Appendix p. 8) Texas has long recognized that the law in effect at the time land is granted controls in subsequent interpretations of the nature of the grant.

> We harbor no doubt that the Mexican (Spanish) law, whatever it may be, in effect at the date of the grant, is what must furnish the applicable rule, and that such is the effect of every decision, observation or assumption that has ever been made by this Court on the subject.... (citations omitted)

Luttes v. State, 159 Tex. 500, 34 S.W.2d 167, 176 (1959).

As to the issue of applying federal law we would draw the Court's attention to *United States v. 1,078.27 Acres of Land*, 446 F.2d 1030, 1040 (5th Cir. 1971) in which Texas law is applied in a suit by the Government to establish a proprietary interest in the land in dispute. (See also, *Humble Refining Co. v. Sun Oil Co.*, 190 F.2d 191, 198 [5th Cir. 1951] "The obligation of the federal courts to follow the local law in land litigation existed before *Erie*...")

Ascertaining exactly what law was in effect at the time of the grant is less straight forward. Texas courts

have allowed expert opinion testimony on Spanish and Mexican law to ascertain what law controlled at the time of a land grant as was used in this California case. *State v. Valmont Plantations*, 346 S.W.2d 853, 865 (Tex.Civ.App.—San Antonio, 1961), *opinion adopted and affirmed* 355 S.W.2d 502, Tex. 1962) (hereafter referred to as *Valmont*).

In *Valmont* Justice Pope did an exhaustive analysis of Mexican and Spanish law which should serve as a model for all subsequent interpretors of Spanish and Mexican grants. Justice Pope makes it clear that a number of sources which may seem archaic, must be searched to establish the legal principles in existence at the time of the land grant in question. The Solicitor General has implied that the California Court was contorting the law by looking to *Las Siete Partidas* whereas, Justice Pope states "... it was and is often necessary to search former codes as well as the more recent ones. *Las Siete Partidas* ... is recognized as the essence of the law of Peninsular Spain after 1348," *Valmont, supra* at 859. The rule of interpretation was to look first to the *Recopilacion de Leyes de Los Reinos de las Indias (Recopilacion)* and later decrees and if they are silent then to look to *Las Siete Partidas*. Therefore, the California Courts reliance on *Las Siete Partidas* was not misplaced nor an attempt to liberate themselves from legal shackles as has been suggested (see brief on the merits for United States p. 4).

B. Texas Statutes Based on Public Trust Concepts

On the Texas Gulf Coast, the State owns in trust for the public the submerged lands of the gulf, bays, inlets, and other tidally-influenced areas. *Rosborough v. Picton*, 34 S.W. 791, 792 (Tex.Civ.App. 1896, no writ). These submerged lands are the Texas equivalent to California's "tidelands," which are the subject of the instant case. The public trust interest of Texas in its

submerged lands is a product of both Mexican and Spanish law and the Anglo-American common law governing public rights in coastal areas.

An example of Texas coastal public trust interests is found in the Texas Coastal Public Lands Management Act, TEX. NAT. RES. CODE §§33.001 et seq. (Vernon's, 1978) With this enactment, the state has sought to organize its management of the state-owned submerged lands, particularly with regard to the granting of leases and easements therein (§§33.101-33.134) and the specifications of structures placed thereon (§33.056). Guiding this management initiative is the declared policy that "[u]ses [of coastal public lands] which the public at large may enjoy and in which the public at large may participate shall take priority over these uses which are limited to fewer individuals." TEX. NAT. RES. CODE §33.001(c)(Vernon's, 1978). (See Appendix A)

Such Texas policies as this and TEX. PARKS & WILD. CODE §1.011 (Vernon's, 1976) have evolved from a tradition of law drawing much of its vigor from the Spanish and Mexican notions of the public trust in tidally-influenced areas, as well as from *Illinois Central R.R. C. v. Illinois*, 146 U.S. 387 (1942) and its progeny. TEX. NAT. RES. CODE §33.001 (Vernon's, 1978) and TEX. PARKS & WILD. CODE §1.011 (Vernon's, 1976) both assert title to the land is held by the State. (See Appendix A and B) Another statute which is the descendant of the Mexican and Spanish law principle that the seashores are held in common by all is the Texas Open Beaches Act. Texas has developed an "open beaches" concept which protects public use and access to all parts of the Gulf of Mexico beach situated between the line of mean low tide and the upland vegetation line, even though that portion of the beach upland of mean high tide is often in private ownership.

Historically, the general public in its use and enjoyment of the state-owned wet beach has made extensive use of pathways to the beach and the dry sand portions of the beach. Texans have for decades utilized the dry beach for fishing, camping, picnicking, driving, and general recreation. Texas law has come to recognize that, in pursuit of its use of the Gulf Coast waters, the public has acquired rights of use over the dry beach through prescription, dedication and custom. Thus, even over privately owned beachfront land, the public enjoys a right of use and access.

This "open beaches" right in the public is safeguarded in state statute, Chapter 61, TEX. NAT. RES. CODE (Vernon's, 1978), which charges various public prosecutors, including the Texas Attorney General, with the duty of protecting and enforcing public access. (See Appendix C for policy statement) The Texas courts have responded by uniformly prohibiting the erection of fences and other structures which interfere with public access on and across the Gulf of Mexico beaches. See: *Moody v. White*, 593 S.W.2d 372 (Tex.Civ.App.—Corpus Christi 1979, no writ); *Gulf Holding Company v. Brazoria County*, 497 S.W.2d 614 (Tex.Civ.App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); *Seaway Company, Inc. v. Attorney General*, 375 S.W.2d 923 (Tex.Civ.App.—Houston 1964, writ ref'd n.r.e.). Much of the basis for the Texas adherence to the open beaches concept is the preservation of meaningful public access to that which has always belonged to the public: submerged lands. Entwined in the evolution of the Texas Open Beaches policy is the inherent public trust nature of coastal submerged lands.

The last statute that will be discussed is TEX. WATER CODE §5.301 (Vernon's Supp. 1982-83) known as the Water Rights Adjudication Act. This Act was established as part of the state's police power and as

in such is less directly relevant here. However, Spanish and Mexican grants are distinguished from other grants under this Act in such a way as to shed some light on the issue before this Court. As stated in §5.302 Declaration of Policy (see Appendix D) this Act is intended to make the most beneficial use of water for the public. The Act attempts to record both riparian and appropriative claims for the surface water resources of the State. The water is owned by the State but the water can be used by individuals to the extent determined by the adjudication process.

Justice Pope in *Valmont* drew the distinction that is generally relied upon in adjudication proceedings, that a riparian irrigation right did not exist under Spanish and Mexican grants unless there was specific language in the grant conveying an interest in water. Citing both *Las Siete Partidas* and *Recopilacion* Justice Pope indicates that the Spanish and Mexican law as applied in Mexico was very protective of the public's rights. Though the law discussed in *Valmont* is not dispositive of the issues in this case, it abrogates the statements of the Solicitor General that a public trust doctrine did not exist under Mexican law.

C. Shoreline and Navigable Streams Judicially Defined

Texas has a shared legal tradition of civil and common law. This common source of legal tradition was tapped by the Texas courts to finally decide an important coastal resource issue: the landward boundary of the state-owned submerged lands along the Texas Gulf Coast. In the landmark decision of *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167 (1959), the Texas Supreme Court looked extensively to Mexican civil law, as well as common law, to determine the landward extent of the coastal tide, and thereby to establish the boundary of the public trust. The Court devoted considerable atten-

tion to the concept of the "shore" under Mexican legal tradition in arriving at its conclusion that littoral grants out of the Spanish and Mexican sovereigns conveyed title only to the line of "mean higher high" tide. The contrasting common law rule places the coastal title boundary further seaward at the line of "mean high" tide. Accordingly, with regard to Spanish or Mexican grants, Texas law now recognizes the extent of state ownership in submerged lands, and therefore the extent of its coastal public trust interest, as runnning to the line of mean higher high tide when dealing with Spanish or Mexican grants.

A further example of Texas' reliance on the public trust doctrine is expressed in the law relating to the ownership of the river beds. The traditional view has been that the sovereign was owner of the rivers and its beds and bottoms and held them in trust for the public use. There has been some difference in application from common law to civil law as to which rivers were burdened with the public trust. In American law the test has been navigability in fact which was a practical adaptation from the English rule of the sovereign owning the river bottoms subject to the ebb and flow of the tide. The Crown was owner of the sea and so long as rivers were subject to the tides they too were an arm of the sea. Mexican law did not distinguish on the basis of navigability but on whether the stream was intermittent or continuous. The beds of streams that regularly flowed were held in common, whereas stream bottoms which are intermittent could be privately owned. See especially *Manry v. Robison*, 122 Tex. 213, 56 S.W.2d 438 (1932). *McCurdy v. Morgan*, 265 S.W.2d 269 (Tex.Civ.App.—San Antonio 1954, writ ref'd).

In 1837 the Republic of Texas enacted the "thirty foot rule" which today is codified in TEX.NAT.RES.CODE §21.003(3). (Vernon's, 1978) "Navigable Stream" means

a stream which retains an average width of 30 feet from the mouth up. This eliminated the concern with whether a stream was navigable in fact and now includes rivers that may not have been covered in either the common law rule or under the civil law, thereby potentially extending the state's ownership.

The definitions of shoreline and navigability make two important points: first, that Texas has recognized a distinction between grants under Mexican and Spanish law and other grants; and second, that the public trust interest was evident under Mexican and Spanish law.

CONCLUSION

Though Texas law rarely speaks of the public trust doctrine per se, the principle that certain lands are held in trust for the benefit of the general public is expressed repeatedly in Texas. We have continuously relied upon the existence of this doctrine under Spanish and Mexican law. It is late in the day to be attacking the very foundation of such public trust concepts, as the Solicitor General has done. It could only work against the public interest in developed and developing Texas coastal law to adopt the position of the United States that Mexican and Spanish antecedants of the public trust doctrine are too ephemeral to underlie modern uses of the doctrine.

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CERTIFICATE OF SERVICE

I, R. Lambeth Townsend, do hereby certify that a true and correct copy of the foregoing On Writ of Certiorari to the Supreme Court of the State of California, was mailed certified mail, return receipt requested, this _____ day of September, 1983, to the following:

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R. LAMBETH TOWNSEND

APPENDIX A

Section 33.001.

(a) The surface estate in the coastal public land of this state constitutes an important and valuable asset dedicated to the permanent school fund and to all the people of Texas, and it is the declared policy of this state that the estate be managed pursuant to the policies stated in the following subsections of this section.

(b) The natural resources of the surface estate in coastal public land shall be preserved. These resources include the natural aesthetic values of those areas and the value of the areas in their natural state for the protection and nurture of all types of marine life and wildlife.

(c) Uses which the public at large may enjoy and in which the public at large may participate shall take priority over those uses which are limited to fewer individuals.

(d) The public interest in navigation in the intracoastal water shall be protected.

(e) Unauthorized use of coastal public land shall be prevented.

(f) Utilization and development of the surface state in the coastal public land shall not be allowed unless the public interest as expressed by this chapter is not significantly impaired by it.

(g) For the purposes of this chapter, the surface estate in coastal public land shall not be alienated except by the granting of leaseholds and lesser interests and by exchanges of coastal public land for littoral property as provided in this chapter.

(h) Vested rights in land shall be protected, subject to the paramount authority of the state in the exercise of police powers to regulate the exercise of these rights, and the orderly use of littoral property in a manner consistent with the public policy of this state shall not be impaired.

TEX.NAT.RES. CODE §33.004 sets out relevant definitions. Note especially (11) "submerged land":

(5) "Coastal area" means the geographic area comprising all the counties in Texas which have any tidewater shoreline, including that portion of the bed and water of the Gulf of Mexico within the jurisdiction of the State of Texas.

and

(11) "Submerged land" means any land extending from the boundary between the land of the state and the littoral owners seaward to the low-water mark on any saltwater lake, bay, inlet, estuary, or inland water within the tidewater limits, and any land lying beneath the body of water, but for the purposes of this chapter only, shall exclude beaches bordering on and the water of the open Gulf of Mexico and the land lying beneath this water.

APPENDIX B

Section 1.011. Property of the State.

(a) All wild animals, fur-bearing animals, wild birds, and wild fowl inside the borders of this state are the property of the people of this state.

(b) All fish and other aquatic animal life contained in the freshwater rivers, creeks, and streams and in lakes or sloughs subject to overflow from rivers or other streams within the borders of this state are the property of the people of this state.

(c) All the beds and bottoms and the products of the beds and bottoms of the public rivers, bayous, lagoons, creeks, lakes, bays, and inlets in this state and of that part of the Gulf of Mexico within the jurisdiction of this state are the property of this state. The state may permit the use of the waters and bottoms and the taking of the products of the bottoms and waters.

(d) The Parks and Wildlife Department shall regulate the taking and conservation of fish, oysters, shrimp, crabs, turtles, terrapins, mussels, lobsters, and all other kinds and forms of marine life, or sand, gravel, marl, mud shell, and all other kinds of shell in accordance with the authority vested in it by this code.

APPENDIX C

Section 61.011. Public Policy.

It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.

APPENDIX D

Section 5.302. Declaration of Policy

The conservation and best utilization of the water resources of this state are a public necessity, and it is in the interest of the people of the state to require recordation with the commission of claims of water rights which are presently unrecorded, to limit the exercise of these claims to actual use, and to provide for the adjudication and administration of water rights to the end that the surface-water resources of the state may be put to their greatest beneficial use. Therefore, this subchapter is in furtherance of the public rights, duties, and functions mentioned in this section and in response to the mandate expressed in Article XVI, Section 59, of the Texas Constitution, and is in the exercise of the police powers of the state in the interest of the public welfare.

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In the Supreme Court of the United States

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v.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE URGING REVERSAL

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QUESTION PRESENTED

Whether the State of California today enjoys a pervasive "public trust" interest in tidelands embraced within a private Mexican grant on the ground that such an interest was reserved by Mexico, was withheld by the United States when it confirmed the grant, and inured to the State under the Equal Footing Doctrine.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-708

SUMMA CORPORATION, PETITIONER

v.

STATE OF CALIFORNIA EX REL. STATE LANDS COMMISSION AND CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE URGING REVERSAL

INTEREST OF THE UNITED STATES

On January 17, 1983, the Court invited the Solicitor General to express the views of the United States in this case. We responded in a Memorandum supporting the petition, and on March 21, 1983, the Court granted certiorari. Having submitted arguments in support of review and reversal that provoked strong dissent from the State of California at the petition stage, it seems appropriate to contribute a fuller presentation now that the Court has determined to give the case plenary consideration.

Even after more than a century, the United States cannot be indifferent to any substantial violation of its solemn treaty obligation to assure that private grants by the Republic of Mexico in California would be "inviolably respected." Treaty of Guadalupe Hidalgo, Feb.

2, 1848, art. VIII, 9 Stat. 929. Nor can we lightly ignore the impairment of patents issued by the United States after elaborate proceedings directed by Congress and undertaken by both the Judicial and Executive Branches of the national government. See Act of Mar. 3, 1851, ch. 41, 9 Stat. 631 *et seq.* These concerns alone justify our participation.

There is, moreover, a more immediate federal interest in the resolution of the case. The United States is today the owner of substantial acreage in California which has been acquired from Mexican grantees or their successors and, in many instances, these federal reservations embrace areas of present or former tidelands. To be sure, the State of California attempts to dismiss our apprehension that the decision below could be extended to such federal lands. See Br. in Opp. to U.S. Memo 14. But we are not clear whether the State is conceding that where the United States is the title owner of the tidelands, it may exclude the public. Or must the federal custodian respect the supposed public rights as "substitute administrator?" Can the national government, implementing constitutional powers, destroy the character of tidelands by filling or draining and building upon them? At all events, we surmise that California would insist that its public trust easement, even if in abeyance during federal ownership, revives in full vigor when the United States conveys the former tidelands—thereby seriously embarrassing the ability of the federal government to dispose of such lands.

STATEMENT

The present controversy concerns a small and very shallow tidal body of water south of Venice, California, a remnant of the substantially larger "Ballona Lagoon" connected—albeit circuitously—to the Pacific Ocean. See Pet. 3-5; Pet. App. A2, A36, A52-A53. It is common ground that the lands underlying the "lagoon" are privately owned and have been since they were included in

a Mexican grant in 1839, a grant confirmed by the United States, after elaborate proceedings under the Act of Mar. 3, 1851, ch. 41, 9 Stat. 631, by issuance of a patent encompassing the lagoon in 1873. See Pet. App. A2, A4, A5, A8. The City of Los Angeles and the State of California nevertheless asserted the right to dredge the lagoon, construct sea walls, make other improvements therein, and open it to public navigation, fishing and recreation, all without exercising the power of eminent domain, and instituted judicial proceedings in state court to vindicate these claims. Pet. App. A2, A3, A36-A37.

The California Superior Court sustained the respondents' position, primarily on the ground that the State enjoyed a "public trust easement" over the lands which included the rights asserted. Pet. App. A59. Additionally, the trial court concluded that the previous owners had "dedicated" the lands in question to public use. Pet. App. A60. Both holdings were reversed by the intermediate appellate court. Pet. App. A35, A45; 117 Cal. App. 3d 335, 172 Cal. Rptr. 619 (1981). But the California Supreme Court, with two Justices dissenting, set aside the intervening ruling and affirmed the trial court. Pet. App. A16, A34. The Supreme Court did not reach the "dedication" claim, resting its judgment solely on the "public trust" doctrine. Pet. App. A16.

The California Supreme Court's ruling depended on four principal steps, each treated as essential to the result: (1) when the Rancho La Ballona was conveyed to the original grantees in 1839, Mexico retained a "public trust" property interest in the tidelands area (Pet. App. A7-A9); (2) when the United States annexed California in 1848, it acquired this interest (Pet. App. A9-A11); (3) the easement was not relinquished to petitioner's predecessors by the issuance of a patent from the United States confirming their title (Pet. App. A11-A15); and (4) upon California's admission to the Union in 1850, the State succeeded to the "public trust" interest in the tidelands, where it remains today (Pet. App. A15).

ARGUMENT

Introduction and Summary

With this decision, the California Supreme Court appears enthusiastically to have embraced a new legal Renaissance, in which modern "humanists" rediscover old texts and invoke the distant past to liberate the spirit from the confining "shackles" of a more conventional era. But we are not witnessing Petrarch, mildly unorthodox in reviving Cicero, or Boccaccio retelling irreverent stories borrowed from Ovid. Here, the half-forgotten ancient models are the codes of the Emperor Justinian and Alfonso the Wise of Castille, the Magna Carta wrested from King John and the treatise of Henry de Bracton.[1] We may question whether such a revolution, not in literature or philosophy, but in the law of property, even on the claim of returning to an earlier wisdom, is equally to be applauded.

It is one thing for a modern legislature to exercise its police powers to restrict the uses of private property for the sake of what is perceived to be the overriding public interest. Such a change of direction is subject to familiar constitutional limitations on retrospective legislation, which, if transgressed, require the payment of compensation. A very different case is presented, however, when, as here, a court purports to impress a pervasive "public trust" easement on lands that had not been so encumbered, on the ground that such a servitude must be "assumed" to have been intended by the original grantor because venerable authorities and current policy converge in suggesting that result, albeit more than a century of contrary practice has intervened. We cannot join in this endeavor.

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[1] See, *e.g.*, Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. D. L. Rev. 195, 196-198 (1980), cited with apparent approval below. Pet. App. A1, A9 n.8. See also, Comment, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 Yale L.J. 762, 763-768 (1970).

A

Although it may be unnecessary, we first challenge the major premise of the court below: that the Mexican grant of the Rancho La Ballona, if it embraced the disputed tidelands at all, reserved for the benefit of the public (in the keeping of governmental authorities) a comprehensive servitude interest of the same character as California's modern "public trust" tidelands easement. We seek to dispel any lingering doubt concerning the inclusion of the lagoon within the original grant, briefly examining the Mexican documents, the available evidence as to the mid-Nineteenth Century geographical facts, and the then prevailing legal regime. Having satisfied ourselves that no mistake was made, we submit there is no basis for supposing that the Mexican government silently reserved an easement over the tidelands it granted out. If this is right, the case is at an end, since the court below did not suggest that, upon acquiring California, the United States withheld from the Mexican grantees any interest the former sovereign had conceded.

B

Next, we turn to the confirmation proceedings undertaken by the United States after the annexation of California. The prescribed procedure, and more, was followed here. Accordingly, under the settled jurisprudence of this Court, whatever was then finally determined is now foreclosed, whether the decision was right or wrong. Scrutiny of these proceedings leaves no room for doubting that, after full debate, the issue whether the disputed tidelands were properly included within the grant was firmly resolved in the affirmative. It remains only to answer the claim that, although unmentioned, a substantial interest in these lands was withheld. We invoke precedents in this Court to show that no such easement could have survived unnoticed.

C

Finally, we question whether, even if some interest in the tidelands escaped the confirmation proceedings, it must be deemed to have passed to the State of California. We notice the absence of any authority for that claim, especially as applied to marginal tidelands apparently not navigable at statehood. At the same time, we leave open the present status of the area under the federal navigational servitude and more recent State and national environmental legislation. In our view, those laws —not the "public trust" doctrine—control the future of the Ballona Lagoon.

A. The Mexican Grant Reserved No Interest From the Conveyance of the Tidelands Included in the Rancho

The decisions of this Court teach that once a Mexican grant in California has been confirmed by proceedings under the special legislation enacted by Congress in 1851, its scope has been defined by survey and a patent has been issued, it is unnecessary—indeed impermissible—to go back to investigate what the Mexican authorities meant to convey. See Point B, *infra*, pp. 17-27. Presumably, the only pretext for looking to the terms of the Mexican grant itself or the law of Mexico is to resolve some ambiguity in the decree of confirmation or the patent subsequently issued. *E.g.*, *Stewart* v. *United States*, 316 U.S. 354 (1942). In our view, this is not such a case, and, accordingly, we believe there is no need to go behind the confirmation proceedings.

Nevertheless, as we have seen, the California Supreme Court chose to rest its decision on the premise—indispensable to the result under that court's reasoning—that Mexico withheld a comprehensive servitude in conveying the tidelands encompassed within the rancho grant. Even if that inquiry was open, we think the answer given below is unfounded and impugns all that follows. Thus, al-

though other errors independently invalidate the judgment, we briefly address this threshold question.[2]

Our focus is restricted to the tidelands or wetlands area, variously labelled a "lagoon," an "inner bay," an "inlet," or an "estuary."[3] The court below somewhat grudgingly accepts respondents' concession that these tidelands were included within the grant (Pet. App. A7-A8, A9 n.9), but then takes back most of what was given by insisting that the former lagoon was (and remains) encumbered by a pervasive easement held by the State in trust for the public. We do not know whether this unusual result was informed by doubts as to the true scope of the Mexican grant or by a suspicion that the tidelands were conveyed by mistake, or worse. See Pet. App. A9 n.9.[4] If so, it may be relevant to show that

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[2] Notwithstanding suggestions to the contrary by respondents (Br. in Opp. 12-17), we deem it clear that, in the present setting, this Court may review the California Supreme Court's determination as to the scope of the Mexican grant of 1839. The court below did not invoke Mexican law as the law of California, but, rather as the source of a *federal* interest later granted to the State. At all events, we read the more recent cases in this Court as repudiating the proposition that construing a federal patent issued under the 1851 law is governed by the *State's* view of Mexican law and the scope of a Mexican grant. If, as we suppose, the initial effect of the federal confirmation proceedings and patent presents a question of federal law, it seems plain that when the answer depends upon determining the meaning of a foreign act in light of foreign law, that ancillary determination is properly undertaken by a federal court. See *United States* v. *Pink*, 315 U.S. 203, 217-218 (1942).

[3] By referring to the historic water body as a "lagoon" and the affected land area as "tidelands" here and elsewhere in this brief, we intend no legal characterization that brings into play the Equal Footing Doctrine. See, *infra*, pp. 27-28. In our view, however, the decision below is equally flawed if the effect of the tides on the area was sufficiently regular to justify the label "tidelands" rather than "wetlands."

[4] Indeed, the trial court, while apparently defining the State and public rights within the Ballona Lagoon as an "easement" (Conclusions of Law 1, 2 and 5, Pet. App. A50), also found that "while

respondents have not been improvident in conceding the inclusion of the lagoon. Once that is settled, no pretext remains for the superimposition of a "tidelands public trust" over privately-owned lands, a concept unknown to the law of Mexico—and never suggested with respect to Mexican grant tidelands even by California until the present case.

1. The documents evidencing the Mexican grant of 1839 are straightforward on their face. There is no meaningful description of the rancho in the original "espediente," consisting of the application, various orders of reference, the favorable recommendations of the City Council Committee on Unoccupied Lands, the Council itself, and the District Prefect, and, finally, the grant from the Governor of the Californias (J.A. 1-6). But the accompanying sketch map ("deseño") (J.A. 7) is tolerably clear in delineating the rough square of the rancho as embracing the Ballona Lagoon. Although its boundaries may not be fully traced, an "estuary" ("estero")[8] is noted for the same area as was later labelled "inner bay" and the principal channels are depicted. Color coding on the map apparently describes most of this portion of the grant as "grazing" land (see J.A. 32), suggesting very shallow wetlands of limited salinity. And, below the "estero," a barrier intervenes before we reach the lower boundary, shown as the coastal beach ("playa"). The subsequent record of juridical possession (J.A. 8-11) is consistent. The mouth of an "estero"—here translated

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subject to Mexican sovereignty, and under Mexican law, the grantees of said grant had no property interest in the lands known as the Ballona Lagoon." Finding 7, Pet. App. A54. Presumably, the Superior Court believed that the Board of Land Commissioners, the United States District Court and the federal Land Department had all been misled in confirming the grantees' title to the lagoon area.

[8] According to Dr. Anthony Orme, the Chairman of the Department of Geography at U.C.L.A. who was an expert witness for respondents at trial (see J.A. 126), the term "estero" especially connotes "a marshy estuary," and is "also used for the land adjoining estuaries inundated by the tide." J.A. 138.

"creek"—is mentioned. J.A. 10. And, significantly, the parcel is described by metes and bounds, unambiguously delimited by the "sea-coast" (J.A. 11), with no portion excepted.[6]

To be sure, in the subsequent confirmation proceedings, neighboring landowners disputed the true boundaries of the Rancho Ballona. As we detail in a moment (*infra*, pp. 17-22), it was once suggested that the so-called "inner bay" was outside the grant (see J.A. 32-34). But that challenge was firmly rejected on the basis of both internal and extrinsic evidence—including affidavits to the effect that most of the area apparently depicted as submerged in the 1858 survey was in fact used as pasturage (J.A. 84, 92). And, at the end of the day—as respondents now accept—it is perfectly clear that the Mexican grant encompassed the disputed "inner bay."

2. There is nothing surprising about this result once we appreciate the character of the tidelands involved. Whatever the exact geography of Ballona Lagoon in the mid-Nineteenth Century, it was not the large unobstructed "inner bay," directly opening to the ocean, that seems to be pictured on the Hancock survey of 1858 (J.A. 26). That false description was expressly repudiated a few years later by the Surveyor-General for California (J.A. 110-112), the Commissioner of the Land Office (J.A. 84-94, at 92), and the Secretary of the Interior (J.A. 100). See, *infra*, pp. 21-22. And Hancock's delineation of the "bay" was dismissed by respondents' expert in the trial below as an "extremely poor," "purely stylized" sketch, "drawn in undoubtedly * * * by eye," not by actual plotting.

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[6] So, also, in further Mexican proceedings relating to the boundaries of the grant in 1840 (J.A. 12-18), five witnesses begin the lower limit at "the mouth of the estuary" and proceed to "the hallows" (presumably the "deep gullies" mentioned in the other documents; J.A. 11, 19, 22). J.A. 13, 14, 15, 16, 17. Two of the witnesses expressly describe this course as being "along the shore." J.A. 13, 16. Again, the seacoast appears to bound the grant, encompassing the inland lagoon. (To understand the descriptions, one must correct all the compass directions by some 90 degrees, reading "southerly" to mean "westerly," etc.)

J.A. 170.[7] We accept that expert's opinion (J.A. 145-146, 171-172) that the most reliable depiction of the mid-Nineteenth Century lagoon is the United States Coast Survey map of 1876 (J.A. 122), which shows almost nine-tenths of Hancock's "inner bay" as salt marsh and mud flats (see J.A. 144-145), even part firm upland, and only relatively small water pools with a narrow and very circuitous connection to the sea.[8] So, also, that expert described the lagoon as a "shallow" area (J.A. 137-138, 164, 167), regularly encumbered by river silt (J.A. 139, 164-167), occasionally cut off entirely from the ocean (J.A. 139-140, 142, 166-167, 175-176), and more influenced by draining river outflow than incoming salt water (J.A. 142-143, 167). See, also, Tr. 187-188 (Carroll Richards). In sum, we deal with a changeable area of overflow, only partly tidal, with no suggestion that it was a navigable waterway.[9]

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[7] Because the lagoon itself was not excluded, the surveyor had no occasion to meander the contours of the water body, nor to depict any portions of it that would more accurately be described as marshland. Similarly, he did not trace the channel leading to the ocean since it was deemed outside the grant.

[8] In an appendix to this brief, we have superimposed the outline of the "inner bay" drawn on the Hancock survey of 1858 over the 1876 Coastal Survey map.

Respondents' expert, Dr. Orme, surmised that the prevalent tufted symbolism represents salt marsh, while the stippling covering the enclosed areas at the right of the map depict mud flats. J.A. 144-145. This jibes with the indications given in 2 A. Shalowitz, *Shore and Sea Boundaries* 188-202 (1964). It is obvious that all the area surrounding the marsh is upland, except at the bottom of the map, where a water channel intervenes before the barrier beach and the sea. We should note that all solid lines indicate boundaries at high water, while the dotted lines show the low water line. *Id.* at 189-191. Thus, it appears that the larger lagoons depicted at the bottom center of the map were reduced to very narrow channels at low water.

[9] Our description is not at odds with any surviving finding of fact below. The Superior Court found (Finding 1, Pet. App. A52) that Ballona Lagoon was (and is) "an arm of the sea * * * subject

It is true that, under Spanish law in force in Mexico, the "sea and its shores" were, in principle, held in common for the benefit of the public and not susceptible of private ownership. Las Siete Partidas, pt. 3, tit. 28, law 3 (J.A. 120). And the "seashore" was defined as embracing "all that space of ground covered by the waters of the sea in their highest annual swells." *Id.*, law 4. No doubt, this rule extended to true bays, harbors, and other navigable "arms of the sea." See *id.*, law 6 (J.A. 121). But it does not follow that the same prohibition on alienation applied to very shallow areas which, although affected by the tide, were substantially disconnected from the open sea and served no significant public uses, navigational or other. It is, after all, common sense that abstract principles ought not be pressed beyond the point where the reason for the rule ceases to support it.

At all events, we know that in territories governed by the law of Spain there was, in practice, no inflexible precept that lands permanently or periodically covered by tidal waters may never be granted in private ownership. As this Court had occasion to notice in a case involving a grant of tidelands during the Spanish pos-

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to the tides of the Pacific Ocean and inundated with seawaters at mean low-tide and mean high-tide," and that it is today "a navigable body of water." See, also, Finding 7, Pet. App. A53-A54. But there is no finding that the lagoon was navigable at the time of the original grant of 1839, the survey of 1858 or the patent of 1873. Present navigability—limited as it is—may well be the result of dredging. See Finding 2, Pet. App. A52. At all events, it is not clear that all these findings survived appeal. The California Court of Appeal apparently accepted the Land Office Commissioner's conclusion that the "inner bay" was not "an arm of the sea" and the evidence of witnesses that the area constituted "pasture land which was periodically flooded by fresh water." Pet. App. A38. The California Supreme Court, after reciting the Commissioner's conclusion (Pet. App. A6), went on to approve the trial court's action in receiving evidence and its finding that, at all relevant times, "the lagoon has been an arm of the sea, subject to the tides." Pet. App. A7. Accepting that determination in no way contradicts the description we have given.

session of the Philippine Islands, the Supreme Judicial Tribunal of Spain ruled in 1863 that the general principle announced in Las Siete Partidas "is not to be taken in an absolutely literal manner" and that, indeed, in appropriate circumstances, the government "may grant shore land for improvement." *Jover* v. *Insular Government*, 221 U.S. 623, 629 (1911). The same approach was obviously followed by Mexico in California, witness the many decisions of this Court confirming private tidelands grants, all more arguably resulted by the Partidas rule than our case. *E.g.*, *San Francisco* v. *Le Roy*, 138 U.S. 656, 670-671 (1891); *Knight* v. *United States Land Association*, 142 U.S. 161, 183-184 (1891); *United States* v. *Coronado Beach Co.*, 255 U.S. 472 (1921); *United States* v. *O'Donnell*, 303 U.S. 501 (1938). See also *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 15, 19-21 (1935).[10]

It is far too late in the day to rewrite history by pretending that the government of Mexico, any more than others before and since,[11] always hued exactly to the sup-

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[10] Signor Laffan, the Mexican law expert cited by the court below (Pet. App. A9 & n.9), noted that one of the ordinances of the Viceroy of the Indies prescribing the procedure for "juridical possession" of a grant instructed the officer undertaking the physical survey to exclude "large lagoons." J.A. 217-218. Although the witness seemed to frown on the departure from the strict principle of Las Siete Partidas, he construed this "Rule 8" as permitting the conveyance of non-navigable lagoons or those wholly enclosed within the boundaries of the grant. J.A. 219-220. Obviously, the Viceroys of New Spain and the Governors of California during the Mexican regime were less fastidious than the modern historian.

[11] At the same time as Las Siete Partidas, Bracton was likewise declaring the shores of the sea to be "common to all" and "inalienable." 2 Bracton, *On the Laws and Customs of England* 16-17, 39-40 (S. Thorne trans. 1968). Yet, in the Seventeenth Century Lord Chief Justice Hale demonstrated that absolute grants of tidelands bordering the sea and its arms had been made since at least the time of Edward the Confessor, and, accordingly, he announced the law to be that the seashore only belonged *prima facie* to the Crown for the benefit of the public. *De Jure Maris*, chs. 4 and 5. In fact, the

posed line announced in a Thirteenth Century Code that in many respects reflected an idealized legal regime rather than current reality.[12] One should perhaps resolve ambiguities by presuming strict adherence to the theoretical rule. But when, as in this instance, it is firmly established that tidelands were granted out—whether this was an exception or common practice—there is no justification for being grudging in conceding the fact and denying the natural consequences. In our view, the California Supreme Court was wholly out of bounds in attempting to "correct," a century and a half later, what it thought an unfortunate deviation from the true model, producing a result at odds with its notion of sound "policy." See Pet. App. A15.

3. The only textual basis for construing the Mexican grant of 1839 as reserving for the benefit of the public an interest in the tidelands conveyed is the stipulation that the grantees "may enclose [the described rancho] without prejudice to the traversing roads and servitudes." See Pet. App. A9. This is a slender reed, indeed. The quoted language is boiler-plate which tells us nothing about whether any roads actually traversed the Rancho Ballona or whether any other servitudes attached to the tract. Nor is it even clear that the proviso invoked is addressed to *public* rights. Significantly, the term "servidumbre" (servitude) is used in Las Siete Partidas only in describing rights or easements owed by one private estate to another (pt. 3, tit. 31)—including various

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English courts have always recognized the validity of tideland grants and even private grants of seabed. *E.g.*, *Attorney General* v. *Emerson*, [1891] A.C. 649; *Foreman* v. *Whitstable Free Fishers*, L.R. 4 H.L. 266 (1869). So, also, even in its landmark decision on the inalienability of navigable water bottoms, this Court approved an exception for "grants of parcels which * * * do not substantially impair the public interest in the lands and waters remaining." *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387, 452, 453 (1892). See also, *Appleby* v. *City of New York*, 271 U.S. 364 (1926).

[12] Indeed, the provisions of Las Siete Partidas dealing with the seashore are obviously borrowed, almost verbatim, from the mid-Sixth Century laws of Justinian. See *Institutes* 2.1.1-6.

rights of way for the passage of persons or vehicles (law 3) or the conveyance of water (law 4), the right of taking water (law 5) or watering animals (law 6), or the privilege of removing clay or sand or stone (law 7).[13] At all events, this Court has explicitly rejected the suggestion that the standard caveat just quoted diminishes an express grant of tidelands. *United States* v. *Coronado, supra*, 255 U.S. at 485-486. See also *Barker* v. *Harvey*, 181 U.S. 481, 498-499 (1901).

Nor does anything cited in Mexican law support the assertion that a public servitude over tidelands conveyed as part of a rancho must be implied, even though not expressly reserved. On the contrary, the court below conceded that it was "not aware of any authority on the question whether a conveyance of tidelands by Mexico (perhaps erroneously) preserved the public's right in the land," but simply "assume[d]" such a rule. Pet. App. A9 n.9. That seems to us a wholly inadequate basis for destroying the value of an apparently unrestricted grant. If presumptions are to be indulged, the rule is that agents of the prior government must be supposed to have enjoyed authority to make the complete conveyance they apparently effected. *Thompson* v. *Los Angeles Farming & Milling Co.*, 180 U.S. 72, 79 (1901); *More* v. *Steinbach*, 127 U.S. 70, 84 (1888).

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[13] The equivocal opinion of the Mexican law expert invoked by the court below (Pet. App. A9) lends no support to respondents' argument. On the one hand, he suggested that the reservation of "servidumbre" intended to preserve "public rights"—albeit the only example given was "expressly constituted rights of traverse on this land" (J.A. 222), not a public easement impliedly imposed by law. Significantly, the witness confessed unfamiliarity with the law of Las Siete Partidas "with regard to servitudes" (J.A. 221-222) and he expressly declined to say whether "a servitude in Mexican law [could] apply to the waters affected by the tides." J.A. 222-223. But, he insisted that Mexico never granted out "a body of water subject to public uses." J.A. 223; see, also, J.A. 220, 221. The upshot is that the witness cannot be invoked to support the proposition that the quoted words of the grant effected the reservation of a *tidelands public trust interest*, a non sequitur in his view, but the only relevant issue here.

There are, moreover, indications that Mexico intended to hold nothing back. We have already noted the decision in *Jover* v. *Insular Government*, *supra*, where this Court confirmed a grant of tidelands with a view to the area being filled and reclaimed, thereby obviously terminating any public access for navigation or fishing. Although that case involved the Spanish regime in the Philippines, the governing law was Las Siete Partidas, the same Code invoked here as imposing a perpetual easement on the tidelands area encompassed in the Ballona Rancho grant. We reasonably may suppose that Mexico construed that provision no differently. What is more, it is common ground that most of the former "inner bay" pictured in this case has long since been filled in and built upon or otherwise appropriated to private use. See Amicus Brief of California Land Title Association, at Exh. 2. We ought not lightly conclude that all this was done in derogation of public rights recognized by Mexican law and continuing in force to this day under the ruling below.

In sum, once it is conceded that the tidelands at stake here were conveyed as private land, there remains no firm basis for concluding that Mexico retained a pervasive easement over the area that required the owner to dedicate it to the public in perpetuity. Common sense tells us otherwise. Especially in the mid-Nineteenth Century, when current ecological and environmental concerns were not yet at the fore, why would a government insist on preservation of barely accessible wetlands that were granted out presumably because they served no public purpose? Whatever may be assumed in respect of subsisting public rights over the shore of the open sea or harbors, or the banks of tidal and other navigable rivers or lakes serving as arteries of commerce, it is extravagant to suppose that the Ballona Lagoon was tacitly preserved for public use after it was included in a private grant. Taking that stance, it seems to us, is to be "more Roman than the Romans."

4. If the submission just made is correct, the entire rationale of the decision below collapses. Indeed, it is not pretended that a Mexican grant conveying unencumbered title to tidelands was whittled down by the United States (for the ultimate benefit of the State of California) by subtracting a critical incident of ownership that Mexico did not reserve. That would seem to be prohibited by the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 929, which in Article VIII (Pet. App. A96) expressly promised that vested property rights would be "inviolably respected," [14] and by the Act of Mar. 3, 1851, which in Section 11 (Pet. App. A111) required the United States to confirm Mexican grants in California in accordance with "the treaty of Guadalupe Hidalgo, the law of nations, [and] the laws, usages, and customs of the government from which the claim is derived."

Nor did the Equal Footing Doctrine authorize such a result, for it is well settled that tidelands already alienated by a previous government—most notably those covered by Mexican grants in California—must be exempted from the normal rule. *E.g.*, *San Francisco* v. *Le Roy*, *supra*, 138 U.S. at 670-671; *Knight* v. *United States Land Association*, *supra*, 142 U.S. at 183-184; *United States* v. *Coronado Beach Co.*, *supra*, 255 U.S. at 487-488; *Borax, Ltd.* v. *Los Angeles*, *supra*, 296 U.S. at 15, 19-21. See also Point C, *infra*, pp. 27-28. And, in any event, whether or not permissible, the California Supreme Court

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[14] We deem frivolous the suggestion by the court below (Pet. App. A16), repeated by respondents (Cal. Br. in Opp. 7; Br. in Opp. to U.S. Memo. 3-4), that Article VIII of the Treaty of Guadalupe Hidalgo meant to *deprive* previous grantees of some part of their interest by promising that they should "enjoy with respect to [their property] guaranties equally ample as if the same belonged to citizens of the United States." See Pet. App. A96. This is obviously a nondiscrimination clause and nothing more. Indeed, if, before annexation, a United States citizen had purchased a Mexican rancho, this clause could not be invoked to diminish his rights. Accordingly, it can have no such effect as against the original Mexican grantee or his heirs.

did not suggest that any rights conceded by Mexico to the grantees were withheld from them by the confirmation decree or patent subsequently awarded by the United States.

B. No Public Trust Easement Over Tidelands Embraced by the Mexican Grant Survived the Confirmation Proceedings and the Patent Issued by the United States

We have shown that, when it included the lagoon within the Rancho Ballona grant, Mexico reserved no public servitude over the area. But, were the question of Mexico's intent in some doubt, the result would be no different. That is so because, whether right or wrong, the decision made on the validity and content of the Mexican grant at the conclusion of the confirmation proceedings undertaken by the United States is conclusive, and because the documents evidencing that determination leave no room for the contention that the trust interest now claimed by California slipped through those elaborate proceedings unnoticed and unadjudicated.

1. It is not debatable that the central purpose of the Act of Mar. 3, 1851 (Pet. App. A108-A114) was to settle, with finality, the boundaries of prior Spanish and Mexican grants within the recently annexed territory of California. Unlike schemes earlier adopted for Louisiana and Florida,[15] Congress determined, in the case of California, to require all claimants, whether their grants were "perfected" or "unperfected," to submit applications for confirmation to a Board of Land Commissioners. Section 8, Pet. App. A109. Judicial review of the Board's decision was provided for, first to the district court, then to this Court. Sections 9 and 10, Pet. App. A110-A111.[16] If the

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[15] See, *e.g.*, Louisiana: Act of Mar. 2, 1805, ch. 26, 2 Stat. 324; Act of Apr. 12, 1814, ch. 52, 3 Stat. 121; Florida: Act of May 8, 1822, ch. 129, 3 Stat. 709; Act of Mar. 3, 1823, ch. 29, 3 Stat. 754; Act of May 23, 1828, ch. 70, 4 Stat. 284.

[16] By Section 12 of the Appropriation Act of Aug. 31, 1852, ch. 108, 10 Stat. 99, the appeal to the District Court was made automatic, albeit the appeal would be dismissed if both the claimant

claim survived this examination, the Department of the Interior was required to undertake a survey of the land. Section 13, Pet. App. A111-A112.[17] And, ultimately, the President would issue a patent in the name of the United States. *Ibid.* Once the process was completed, the determination was expressly declared "conclusive," at least between the claimant and the United States. Section 15, Pet. App. A113.[18]

Here, the full procedure—and more—was carried out. The Commissioners confirmed the Rancho La Ballona grant. J.A. 21. The district court upheld the Board's decision (J.A. 22) and an appeal to this Court was dismissed. J.A. 24. A survey was then made (J.A. 26). Although initially questioned (J.A. 32), the boundaries described in the survey were ultimately approved, both by the Commissioner of the General Land Office (J.A. 84) and the Secretary of the Interior. J.A. 100. And a formal patent, reciting the same boundaries in detail, was finally issued. J.A. 101. It follows, as one would expect, that whatever was determined by these confirmation proceedings and the patent issued is now foreclosed,

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and the United States failed to prosecute. After 1864, the second appeal went to the Circuit Court, rather than this Court. Act of July 1, 1864, ch. 194, Section 3, 13 Stat. 333; Act of July 23, 1866, ch. 219, Section 9, 14 Stat. 221.

[17] From 1860, notice of such surveys was required to be published in local newspapers and, for a time, the district courts were given jurisdiction to entertain objections to the survey by "any party interested." Act of July 14, 1860, ch. 128, Section 2, 12 Stat. 33. The 1864 Act, *supra*, transferred this review function to the Commissioner of the Land Office in Washington, who was required to entertain objections to the survey "by any party claiming to have an interest in the tract embraced by the survey." This latter procedure was followed in the present case. See J.A. 37, 38.

[18] Although the 1851 Act stipulated that the patent issued "shall not affect the interests of [illegible]d parties," the breadth of this proviso was presumably diminished as to contesting intervenors who submitted objections to the underlying survey under the 1860 and 1864 legislation. See, *supra*, note 17.

whether or not the decision correctly construed the original grant from Mexico. So much is firmly established by a long line of precedents in this Court. *E.g.*, *United States* v. *O'Donnell*, *supra*, 303 U.S. at 512-514; *United States* v. *Title Insurance Co.*, *supra*, 265 U.S. at 483-486; *United States* v. *Coronado Beach Co.*, *supra*, 255 U.S. at 487-488; *Thompson* v. *Los Angeles Farming & Milling Co.*, *supra*, 180 U.S. at 77; *Knight* v. *United States Land Association*, *supra*, 142 U.S. at 182-189; *San Francisco* v. *Le Roy*, *supra*, 138 U.S. at 672; *Beard* v. *Federy*, 70 U.S. (3 Wall.) 478, 489 (1865). And it is equally well settled that this principle applies to any interest asserted by the State or its grantees which, as here, derives from the United States. *United States* v. *Coronado Beach Co.*, *supra*, 255 U.S. at 488; *Knight* v. *United States Land Association*, *supra*, 142 U.S. at 183-184; *San Francisco* v. *Le Roy*, *supra*, 138 U.S. at 670-671.[19]

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[19] *New Orleans* v. *United States*, 35 U.S. (10 Pet.) 662 (1836), is not to the contrary. To be sure, the Court there held that New Orleans was not barred from asserting public rights in riverfront lands notwithstanding the earlier rejection of the City's claim by a Board of Commissioners established under the Act of Mar. 2, 1805, *supra*. 35 U.S. (10 Pet.) at 733-734. But the critical distinction is that the Board established by that legislation—unlike here—merely made recommendations to Congress, which, absent congressional action, lacked legal force or effect. Thus, as with the comparable scheme established for Florida, the Board's rejection of a claim did not amount to a forfeiture of title. See *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 90-95 (1833); *New Orleans* v. *United States*, *supra*, 35 U.S. (10 Pet.) at 736. See also *Block* v. *North Dakota*, No. 81-2337 (May 2, 1983), slip op. 15-16 n.25.

Nor can respondents derive much comfort from *Eldridge* v. *Trezevant*, 160 U.S. 452 (1896). That case did not involve a confirmatory patent, as we have here, but an outright grant from the United States. Indeed, the grantee sought exemption from the traditional levee easement because his title was not "derived by grant from Spain or France, or from the State * * * [but] from the United States." *Id.* at 466. See also *id.* at 468. Thus, *Eldridge* holds no more than that a federal patent granting land owned by the United States did not nullify a limited servitude for the construction of levees for the public safety which had long before been announced in the local laws as applicable to lands bordering the Mississippi

Thus, the only issue now open is whether the tidelands easement claimed by respondents was left unadjudicated in the proceedings confirming the Ballona grant. This is a novel question only because, until the present case, neither California nor any member of the public had thought to assert such a servitude over privately owned tidelands embraced within a Mexican grant. In the several like controversies reaching this Court—*Le Roy*, *Knight*, *Coronado Beach Co.*, *O'Donnell* and *Stewart*, all previously cited—the only issue litigated was title to the tidelands. Indeed, it may be doubted if those cases would have been pursued so far had it been appreciated that the prevailing party must in any event concede a pervasive easement over the property that denied him the practical benefit of his victory. But, however strained the question, we must attempt an answer.

1. Once again, it is appropriate to stress that there is nothing equivocal about the confirmation of the Mexican grantees' title to the tidelands in suit. Both the decision of the Board of Commissioners (J.A. 21) and the decree of the District Court (J.A. 22) expressly fix the southwestern boundary of the grant as "the Sea Coast," excepting nothing, and therefore plainly include the lagoon as part of the Rancho. Even more explicit are the survey of 1858 (J.A. 26), the underlying field notes (J.A. 27), and the patent of 1873 (J.A. 101)—which recites the field notes. In each document, the lagoon, called "inner

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River and other rivers subject to overflow. As this Court noted, the rule was "explicitly asserted in the Civil Code of Louisiana." *Id.* at 463. In fact, the same provision was included in the Digest of the Civil Laws Now in Force in the Territory of Orleans, approved by the Territorial Legislature and Governor Claiborne in 1808 (see Act of Mar. 31, 1808, Acts of the Terr. of Orleans, 2d Leg., 1st Sess., ch. 29, 120-128), and commonly known as the "Civil Code of 1808." See 16 West's LSA-C.C. 407 (1972). It was carried forward in the Civil Code of 1825 (Art. 661) and the Revised Civil Code of 1870 (Art. 665). *Ibid.* In these circumstances, the Court deemed it appropriate to construe a patent issued after the Louisiana Purchase (and presumably after 1808) as subordinating the estate granted to the then established levee servitude.

bay," is depicted or described, but not meandered, as it would be if meant to be excluded.

This is more than enough. But, in fact, we know that the question whether the tidelands area should be excluded was not inadvertently overlooked. On the contrary, that issue was much debated, over a dozen years. The status of the lagoon was initially raised in 1860 by the Commissioner of the Land Office who declined to approve the Hancock survey of 1858 largely on the ground that the "inner bay" shown there ought to be wholly excluded and its northern shore deemed the southern boundary of the property. J.A. 33. It appears the Commissioner was misled by the label given the water body and the false depiction of it as a large, unobstructed arm of the sea apparently directly connected to the ocean.[20] At all events, the Commissioner's action encouraged the owners of the adjoining rancho on the west to dispute the surveyed boundary on that side (J.A. 39-49, 50-55, 95-99), eventually adopting the Commissioner's view that the southern boundary of the Rancho Ballona ought to follow the shore of the lagoon, rather than the sea coast, thereby pulling back the western limit. See J.A. 96-99.[21] For their part, the Ballona owners argued for retaining the seacoast boundary (J.A. 63-69), submitting a number of affidavits denying the description of the lagoon as an arm of the sea. J.A. 55, 58, 60, 70, 72, 73. The Surveyor-General for California returned the matter to Washington (J.A. 110-112),[22] suggesting no need for a new survey.

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[20] As we have noted (*supra*, note 7), deeming the "inner bay" within the outer boundaries of the grant and included, the surveyor had no occasion to plot this feature or delimit it with accuracy.

[21] It is noteworthy, nevertheless, that, at one stage, attorneys for the contestants felt bound to accept the sea coast as the southern boundary because, however erroneous, that limit was recited in the Mexican act of juridical possession, followed by the final decree of the District Court, and, accordingly, had become "the law of the case." J.A. 52.

[22] Although dated "Dec. 18th 1873," it is obvious that this communication preceded the Commissioner's decision of April 30, 1873

As for the so-called "inner bay," he deemed it properly included, describing it as "formed by the waters of the Ballona Creek and * * * increased or diminished in extent as the outlet of the same to the sea is more or less choked by the beach sands" (J.A. 111). In 1873, after still further argument (J.A. 76-83), the then Commissioner accepted these representations, repudiated his predecessor's ruling, and approved the 1858 survey boundaries encompassing the lagoon—which he expressly concluded was not an "arm of the sea." J.A. 84-94, especially at 92. The owners of the neighboring rancho appealed to the Secretary, once again arguing for retracing the boundaries of the Ballona grant by following the northern shore of the lagoon and excluding it. J.A. 95-99. But the Secretary upheld the Commissioner's determination, concluding that "the weight of evidence establishes the correctness of the survey [of 1858]." J.A. 100.

In light of this special focus on the hotly contested issue of the so-called "inner bay," it is impossible to entertain any doubt concerning its final resolution. The matter was very deliberately decided in favor of including the lagoon after more than full adversary proceedings. Nor is there any lingering "ambiguity" because the survey, giving a false image of the lagoon, was not revised. The survey was approved for its plotted boundaries, not the irrelevant sketch of an internal feature. Indeed, we cannot appreciate how the court below saw any contradiction between approval of the survey—whose only function was to fix the boundaries of the grant—and the determination that the lagoon was not an "arm of the sea." See Pet. App. A6-A7. But, however that may be, there is certainly no pretext for diminishing the effect of the patent embracing the tidelands area on the ground that its inclusion was an oversight.

2. It remains to rebut the suggestion that, if bare title to the tidelands must be conceded to the Mexican

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(J.A. 84). Probably, the Surveyor-General's letter should be dated 1872.

grantees and their successors, the confirmation proceedings and the patent did not touch the public easement attaching to these lands (assuming Mexico had withheld such an interest).

Of course, no one contends that the patent issued by the United States, or anything that went before, immunized the tidelands—or any other lands encompassed within the confirmed grant—from the *governmental* authority of the United States or the State of California. See Point C, *infra*, pp. 28-30. But, as we understand the decisions of the California Supreme Court, the public trust interest recognized is a servitude existing independent of any exercise of the police power, which can be asserted by any interested citizen, if need be, *against* the attempt by governmental authority to relinquish it. See, *e.g.*, *Marks* v. *Whitney*, 6 Cal. 3d 251, 261-262, 491 P.2d 374, 381-382, 98 Cal. Rptr. 790, 797-798 (1971). In sum, what is claimed is a substantial reserved interest, a pervasive easement or servitude significantly encumbering the normal incidents of ownership. It is in that light that we must consider whether such an interest survived the federal confirmation proceedings.

a. The first observation to be made is how extraordinary it is that, during all the proceedings from the application to the Board of Commissioners in October 1852 (J.A. 19) to the issuance of the patent in December 1873 (J.A. 101), neither the United States nor the State of California claimed any interest in the tidelands area. Since, in principle, what was being determined was the status of the Mexican grant as of the date of annexation (1848), the United States had a duty to assert any adverse claim of the federal government derived from Mexico. On the other hand, the new State, admitted in 1850, well before the confirmation proceedings began, had an obvious concern in putting forward—or urging the United States on its behalf to assert—an interest of such magnitude.[25] The federal government department with special

[25] Under Section 3 of the 1860 Act, *supra*, those claiming any "right or title derived from the United States" were not entitled to

responsibility for land matters, itself conducting the proceedings, had ample opportunity to interpose its claim. Nor can we suppose that the State authorities were unaware of what was at issue.[24] Yet, neither government made the slightest effort to protect this supposed public trust easement.

b. The only possible reply is that the kind of interest asserted was inappropriate for recognition in the proceedings conducted under the 1851 Act or for explicit mention in the patent ultimately issued. But any such contention is foreclosed by decisions of this Court.

It is certainly not maintainable that the tidelands easement now claimed was left untouched by the confirmation proceedings because it is a "sovereign right," rather than a private property interest. The guiding purpose of the Act of 1851 was to identify the extent of the public domain by settling private land claims. As to all lands, or interests in land, not previously conveyed, the United States retained full proprietary powers. It could withdraw such areas for special purposes, open them to settlement, or cede them to the State. To be sure, by the date of the confirmation proceedings, California had been admitted and the United States had already granted some character of lands to the State, whether the beds of navigable water bodies under the Equal Footing Doctrine or swamp and overflowed lands under the Act of Sept. 28, 1850, ch. 84, 9 Stat. 519. But that did not withdraw such interests from the procedure established under the 1851 legislation. On the contrary, the State's potential claim,

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intervene in the district court, but were permitted to "aid" the United States Attorney in representing their interest through separate counsel. After 1864, however, it appears that California was wholly free to interpose its claim before the Land Commissioner. See Act of July 1, 1864, *supra*.

[24] As we have noted (*supra*, note 17), from 1860, surveys were required to be advertised and made available for inspection. The survey of the Rancho La Ballona was in fact advertised in 1860 (see J.A. 35) and re-advertised under the 1864 Act. See J.A. 37, 38.

derived from the United States, made it especially appropriate to determine what, if any, interest the federal government had to give. See *United States* v. *O'Donnell*, *supra*, 303 U.S. at 509-513. And the decision rendered on that score was conclusive, equally against the State and its grantees as against the United States itself. *Id.* at 512-513. See also, *supra*, p. 19.

c. There is no greater merit in the suggestion that any interest less than full title was beyond the scope of the confirmation proceedings envisaged by the 1851 Act. Again, the decisions of this Court firmly reject that proposition.

We may readily assume that neither the Board of Land Commissioners nor the United States Land Office was concerned to identify mortgage liens, remainder interests, or private rights of way encumbering the property. So, also, in an early case, this Court stated that confirmation of the grant to a pueblo need not expressly recite the beneficial interest of individual lot holders or other inhabitants of the city. *Townsend* v. *Greeley*, 72 U.S. (5 Wall.) 326, 335 (1866).[26] The examples given merely implement the caveat in Section 15 of the 1851 Act (Pet.

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[26] In fact, the language invoked from *Townsend* (Calif. Br. in Opp. 19-20) was gratuitous dictum since the decree of confirmation entered by the Circuit Court (per Mr. Justice Field, sitting as Circuit Judge) on direct appeal from the Board's decision explicitly stipulated:

> This confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town or city of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city.

See 72 U.S. (5 Wall.) at 337; *San Francisco* v. *Le Roy*, *supra*, 138 U.S. at 662 n.1, 665-666, 667. At all events, Section 14 of the Act of Mar. 3, 1851, expressly provided for a "wholesale" confirmation in the case of Spanish or Mexican grants to pueblos. Pet. App. A112-A113.

Moreover, the beneficial interest in *Townsend* was not alleged to have derived from the United States. On that ground alone, it must be distinguished from the public trust easement vindicated here.

App. A113) that proceedings thereunder should not prejudice the rights of "third persons." But that is not our case, in which the claim is said to derive from the United States, whose interests were expressly subjected to "conclusive" determination. *Ibid.*[26]

Moreover, even with respect to non-governmental claims which, if sustained, would seriously embarrass the rights of the grantee, the Court more recently has held that they must be submitted or deemed abandoned. Thus, in *Barker* v. *Harvey, supra*, it was ruled that the Indians' right of occupancy in Mexican grant lands was terminated when not presented in patent proceedings and not expressly reserved in the decision. As the Court said (181 U.S. at 492):

> Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy.

That ruling was expressly re-affirmed a quarter century later, despite the plea of the United States for reconsideration. *United States* v. *Title Insurance Co.*, 265 U.S. 472 (1924).

The analogy with the present case is obvious. Here, as there, the claim asserted would impose a perpetual easement which largely destroys the value of the affected land. In both situations the United States presumably should have advanced the interest, if indeed it existed, as "trustee" for another, whether the Indians or the State. Yet, in the cited precedents, the Court held the Indians barred. It can hardly be just to accord more favorable treatment to California, whose default is less excusable.

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[26] It was once suggested that confirmation proceedings under the 1851 Act could not determine whether minerals had been reserved from a Mexican grant for the benefit of the government. *Fremont* v. *United States*, 58 U.S. (17 How.) 541, 565 (1854). But the Court effectively overruled that decision a few years later. *United States* v. *Castillero*, 67 U.S. (2 Black) 17, 166-169 (1862).

In sum, if (contrary to our submission) the kind of pervasive public trust easement now claimed survived the grant of the tidelands from Mexico, it could and should have been advanced before the patent issued. The present attempt to revive that servitude comes a century too late.

C. The Equal Footing Doctrine Granted no Tidelands Easement to California

As we have already noted, it is well established that the Equal Footing Doctrine did not reserve to California any interest in tidelands which the United States confirmed to private grantees in compliance with earlier treaty obligations. See, *supra*, p. 16. But even if—contrary to all that has been said—some landed easement survived the grant confirmation proceedings, it may be doubted whether any such interest passed to California.

1. So far as we are aware, there is no precedent for that result. Traditionally, the Equal Footing Doctrine has been held to effect a transfer to the State of the whole title to tidal water bottoms. *E.g.*, *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845). It does not follow, however, that any lesser interest in tidelands is likewise embraced by the constitutional doctrine. So far as the easement claimed is related to navigational concerns, it would seem to merge in the federal navigation servitude, an aspect of the power and responsibility confided to the Nation itself by the Commerce Clause of the Constitution which has not been relinquished to the States. See *Montana* v. *United States*, 450 U.S. 544, 551 (1981); *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 375-376 (1977). And, to the extent that California is asserting a sovereign prerogative to control land use or the appropriation of water, that is merely an incident of the police power unrelated to State title under the *Pollard* rule.

What is more, it is very questionable whether the Equal Footing Doctrine reached the lagoon, as it existed

at statehood.[27] Although the *Pollard* rule embraces the "shores," or tidelands, of navigable water bodies, it is far from clear that this principle extends to the shores of a discrete non-navigable body of water which, although affected by the tide, is only tenuously connected to the sea or a navigable arm of the sea. See *San Francisco* v. *Le Roy*, *supra*, 138 U.S. at 671-672. Indeed, it appears that, at trial, the City of Los Angeles expressly conceded that Ballona Lagoon did not qualify under the Equal Footing Doctrine. Clerk's Transcript on Appeal at 986.[28]

In sum, we challenge the easy assumption indulged by the court below that any interest retained by the United States was automatically passed on to the State.

2. Finally, we stress again that nothing said is intended to imply that either the Treaty with Mexico or the patent issued under the Act of 1851 can defeat the

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[27] It may be that substantial portions of the area to which the public easement is said to have attached would have qualified as "swamp and overflowed lands" under the Act of Sept. 28, 1850, *supra*. But, again, that grant reached only unappropriated lands of the United States, not lands embraced by Mexican grants confirmed under the 1851 Act. See, *e.g.*, *United States* v. *O'Donnell*, *supra*. We know of no authority construing the Swamp Lands Act as transferring to the State an easement over private lands.

Nor does the Submerged Lands Act, 43 U.S.C. (& Supp. V) 1301 *et seq.*, support respondents. That statute expressly excepts from the grant to the States previously alienated unsurveyed stream beds (43 U.S.C. 1301(f)), an exemption which may be taken also to embrace tidelands like those involved here. At all events, neither the Act nor the Equal Footing Doctrine preserves a State interest (assuming it ever attached) in former tidelands that have since become uplands, whether as a result of natural or artificial accretion or reliction. *California ex rel. Lands Commission* v. *United States*, No. 89, Orig. (June 18, 1982), slip op. 12 n.14; see 43 U.S.C. 1301(a)(1)-(2), construed in 42 Op. Att'y Gen. 241, 262 (1963).

[28] We refer to a supplemental memorandum filed March 5, 1979, in which counsel for Los Angeles stated: "Therefore, the City can, and does, admit that the waters of the Ballona Lagoon do not meet the federal definition for the purpose of navigability * * * [as set forth] in *Utah* v. *United States*, [403 U.S. 9 (1971)]—an Equal Footing case.

legislative power of the federal or State governments, within constitutional limitations, to restrict the uses of the granted lands in the public interest. Thus, to the extent that Ballona Lagoon is today actually or potentially a navigable waterway for interstate or international commerce, it is fully subject to the exercise of the federal navigational servitude, even though no interest in the underlying lands has been reserved. *E.g.*, *Appleby* v. *City of New York*, *supra*, 271 U.S. at 401; *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U.S. 82, 87-88 (1913). Nor is Congressional power under the Commerce Clause limited to strictly navigable waters which qualify as free public highways. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 170-174 (1979). Indeed, there are today many federal environmental protection programs that would bear on the area in question, whether it is properly viewed as navigable water, or tidelands or wetlands. *E.g.*, Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401, 403, 404, 406, 407; Clean Water Act of 1977, 33 U.S.C. (& Supp. V) 1342, 1344; Coastal Zone Management Improvement Act of 1980, 16 U.S.C. (& Supp. V) 1451 *et seq.*

By the same token, we are not remotely suggesting that Mexican grant lands are uniquely immune from legitimate regulation by the State in the exercise of its police power. Indeed, it may well be that, regardless of any reserved "public trust" interest, existing California law substantially protects the subsisting lagoon area. See, *e.g.*, Cal. Pub. Res. Code §§ 5810-5817, 30300 *et seq.* (West 1977 & Cum. Pocket Part 1983); Cal. Water Code §§ 13370-13381 (West Cum. Pocket Part 1983). Such regulation does not depend upon recognition of any proprietary easement withheld by the Republic of Mexico and passed on to the State. Cf. *Sporhase* v. *Nebraska ex rel. Douglas*, No. 81-613 (July 2, 1982), slip op. 8-9.[29] Nor are Cali-

[29] See generally Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. Fla. L. Rev. 561 (1982).

fornia's municipalities powerless to prevent development that adversely affects the public interest. See, *e.g.*, *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1981).

In sum, our disagreement with the decision below is primarily focused on the means, rather than the end. But if we rightly understand the implications of the principle invoked, that is not an insignificant objection. At all events, here California has successfully asserted something more than a governmental power to protect existing tidelands in the public interest. What has been adjudicated to the State is a property interest in the land, said to have been reserved by Mexico, conveyed to the United States and, finally, transferred to the State in 1850. This claim in no way derives from California's sovereign prerogatives and cannot be sustained by any appeal to State property law, whether declared in the usual way by legislative action or "discovered" as an aspect of the "common law" by California's courts.

CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be reversed.

Respectfully submitted.

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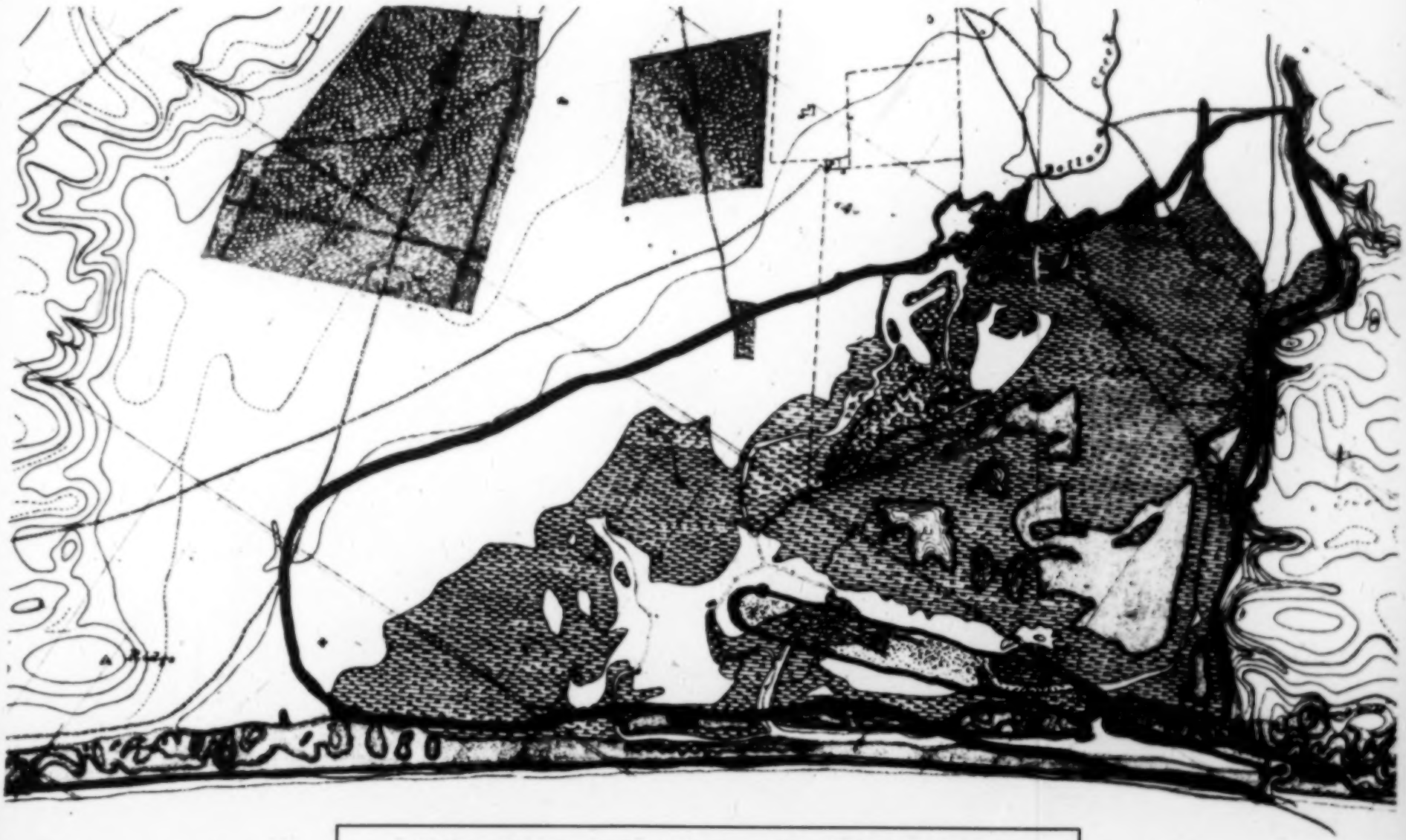

Outline of "Inner Bay" as Shown on Hancock Survey of 1858
Superimposed on 1876 United States Coast Survey Map

No. 82-708-CSX
Status: GRANTED

Title: Summa Corporation, Petitioner
v.
California ex rel. State Lands Commission and City of Los Angeles

Docketed:
October 22, 1982

Court: Supreme Court of California

Counsel for petitioner: Christopher, Warren M.

Counsel for respondent: Saggese, Nancy Alvarado, Netzer, Gary R.

Entry	Date	Note	Proceedings and Orders
1	Aug 24 1982		Application for extension of time to file petition and order granting same until October 22, 1982 (Rehnquist, August 26, 1982).
2	Oct 22 1982	G	Petition for writ of certiorari filed.
3	Oct 22 1982		Appendix of petitioner Summa Corp. filed.
4	Nov 1 1982		Petitioners letter in compliance with Rule 28.1 filed.
6	Nov 15 1982		Order extending time to file response to petition until December 22, 1982.
8	Nov 16 1982		Order extending time to file response to petition until December 22, 1982.
9	Dec 14 1982		Brief amicus curiae of California Land Title Assn. filed.
10	Dec 22 1982		DISTRIBUTED. January 14, 1983
~~11~~	~~Dec 23 1982~~	~~X~~	~~Brief of respondent CA ex rel. Lands Comm. in opposition~~ filed.
12	Dec 28 1982	X	Brief of respondents CA ex rel. Lands Comm., et al. in opposition filed.
13	Dec 30 1982	X	Brief of respondent City of Los Angeles in opposition filed.
14	Jan 3 1983	X	Reply brief of petitioner Summa Corp. filed.
15	Jan 17 1983	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
16	Feb 18 1983		Brief amicus curiae of United States filed.
17	Feb 23 1983		DISTRIBUTED. March 18, 1983
18	Mar 8 1983	X	Brief of State of California in opposition to brief amicus curiae of the United States filed.
19	Mar 21 1983		Petition GRANTED.
			**********
21	Apr 14 1983		Order extending time to file brief of petitioner on the merits until June 6, 1983.
22	Jun 3 1983		Order further extending time to file brief of petitioner on the merits until June 9, 1983.
23	Jun 7 1983	G	Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae filed.
24	Jun 8 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
25	Jun 8 1983		Brief amicus curiae of United States filed.
27	Jun 8 1983	G	Motion of California Land Title Association for leave to file a brief as amicus curiae filed.
28	Jun 9 1983		Brief of petitioner Summa Corp. filed.
29	Jun 9 1983		Joint appendix filed.
~~30~~	~~Jun 13 1983~~		~~Opposition of respondents to motion of Pacific Legal~~

No. 82-708-CSX

Entry	Date	Note	Proceedings and Orders
			~~Foundation for leave to file a brief as amicus curiae filed.~~
31	Jun 13 1983		Opposition of respondents to motion of California Land Title Association for leave to file a brief as amicus curiae filed.
32	Jun 20 1983		Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae GRANTED.
33	Jun 20 1983		Motion of California Land Title Association for leave to file a brief as amicus curiae GRANTED.
34	Jun 20 1983		Motion of the Solicitor General for leave to participate in oral GRANTED.
36	Jun 17 1983		Supplement to Joint Appendix filed.
37	Jun 20 1983		Opposition to Motion for Leave to file brief amicus curiae of Pacific Legal Found. and Motion to strike
38	Jun 20 1983		portions of proposed brief amicus curiae of Calif. Land Title Assn.
39	Jun 20 1983		Record filed.
40	Jun 20 1983		Certified original record, box, received.
42	Jul 1 1983		Order extending time to file brief of respondent on the merits until August 15, 1983.
43	Aug 15 1983		Order further extending time to file brief of respondent on the merits until September 14, 1983.
44	Aug 15 1983	G	Motion of Amigos de Bolsa Chica for leave to file a brief as amicus curiae filed.
45	Sep 8 1983		Motion of Amigos de Bolsa Chica for leave to file a brief as amicus curiae GRANTED.
46	Sep 14 1983		Brief of respondent City of Los Angeles filed.
47	Sep 15 1983	G	Motion of National Audubon Society, et al. for leave to file a brief as amici curiae filed.
48	Sep 16 1983		Brief of respondent California ex rel. State Lands Comm. filed.
49	Sep 14 1983		Brief amicus curiae of Texas filed.
50	Oct 11 1983		Motion of National Audubon Society, et al. for leave to file a brief as amici curiae GRANTED.
51	Oct 14 1983		CIRCULATED.
52	Jan 9 1984		SET FOR ARGUMENT. Wednesday, February 29, 1984. (2nd case)
53	Feb 13 1984	X	Reply brief of petitioner Summa Corp. filed.
54	Feb 29 1984		ARGUED.